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Building Resilience in Strained Refugee-Hosting States? The EU in The Face of Lebanon's Cumulative Crises

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Published in:

The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees

DOI (link to publication from Publisher):

[10.2870/541854](https://doi.org/10.2870/541854)

Publication date:

2021

Document Version

Publisher's PDF, also known as Version of record

[Link to publication from Aalborg University](#)

Citation for published version (APA):

Fakhoury, T. (2021). Building Resilience in Strained Refugee-Hosting States? The EU in The Face of Lebanon's Cumulative Crises. In S. Carrera, & A. Geddes (Eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees : International Experiences on Containment and Mobility and their Impacts on Trust and Rights* (pp. 144-156). European University Institute. <https://doi.org/10.2870/541854>

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The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees

International Experiences on Containment and
Mobility and their Impacts on Trust and Rights

Editors

Sergio Carrera and Andrew Geddes

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Editorial matter and selection © Sergio Carrera and Andrew Geddes, 2021

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Published by

European University Institute (EUI)

Via dei Roccettini 9, I-50014

San Domenico di Fiesole (FI)

Italy

ISBN:978-92-9084-999-5

doi:10.2870/541854



ASILE
Global Asylum
Governance and
the European
Union's Role

This Book falls within the scope of the ASILE Project. ASILE studies the interactions between emerging international protection systems and the United Nations Global Compact for Refugees (UN GCR), with particular focus on the EU's role. It examines the characteristics of international and country-specific asylum governance instruments and arrangements, and their compatibility with international and regional human rights and refugee laws. For more information about the project see: www.asileproject.eu



The ASILE project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787.



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Editors

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PREFACE

In September 2020, the European Commission published what it described as a *New Pact on Migration and Asylum* (emphasis added) that lays down a multi-annual policy agenda on issues that have been central to debate about the future of European integration. This book critically examines the new Pact as part of a Forum organized by the Horizon 2020 project ASILE – *Global Asylum Governance and the EU's Role*.

ASILE studies interactions between emerging international protection systems and the United Nations Global Compact for Refugees (UN GCR), with particular focus on the European Union's role and the UN GCR's implementation dynamics. It brings together a new international network of scholars from 13 institutions examining the characteristics of international and country specific asylum governance instruments and arrangements applicable to people seeking international protection. It studies the compatibility of these governance instruments' with international protection and human rights, and the UN GCR's call for global solidarity and responsibility sharing.

ASILE facilitates groundbreaking insights into the role and impacts of legal and policy responses – *instruments* – on refugee protection and sharing of responsibility from the perspective of their effectiveness, fairness and consistency with refugee protection and human rights. It does so through an examination and mapping of UN GCR *actors* – and their legal responsibilities and accountability – that have varying roles in the design and implementation of mobility and containment instruments applied to people in search of international protection across various world regions. The project studies the impacts of vulnerability and status recognition assessments – which often find expression in these same instruments and actors – on individuals' rights and refugees' agency. ASILE also aims at identifying lessons learned and 'promising practices' on refugee protection.

The Chapters that follow assess the new components and policy priorities laid down in the EU Pact on Migration and Asylum from different multidisciplinary perspectives and world regions experiences. They explore the rights and international protection implications, enshrined both in the foundations of the UN GCR and the EU Treaties as well as policy and governance arrangements both domestically and internationally. They address the implications of these policy and governance approaches for the geopolitics of international law, paying attention to the relations that the Pact seeks to promote between states and other relevant international and regional actors, and also how its proposed policy roadmap can be expected to transform or reconfigure these relations.

In light of the ASILE project objectives, the Chapters pay particular attention to the scope of the mobility and containment components of asylum governance instruments and their implementing actors in Europe and other world regions, as well as their inclusionary or exclusionary effects on individuals' rights and international protection.

We would like first to express our gratitude to all the contributors of this volume for their most insightful Chapters and their excellent cooperation during the implementation of the Forum and the production of this Book. Special thanks go to Professors Gregor Noll, Jens Vedsted-Hansen and Thomas Spijkerboer for their key roles in the original idea, design and launch of the first ASILE Forum on the EU Pact on Migration and Asylum, as well as their most helpful comments and invaluable advice during the drafting of the kick-off Essay included in Chapter 1 of the Book. We are very grateful for all the substantial contributions and inputs by Heidi Betts, who has played a key role in the professional editing of all the Chapters and the Forum, and by Miriam Mir (Project Manager at CEPS), who played an equally central role in the daily running and successful completion of the first ASILE Forum. Finally, we would like to thank Andrew Fallone for his great assistance and inputs in completing the editing and formatting of the Book.

1. Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum

Sergio Carrera

1.1 Introduction

This Chapter examines the EU Pact on Migration and Asylum (hereinafter the Pact), published on 23 September 2020 (European Commission, 2020a), as conditioned by the United Nations Global Compact on Refugees (UN GCR) and the EU Treaties. It is the kick-off contribution opening the first Forum organised in the scope of the H2020 Project ASILE (Global Asylum Governance and the EU's Role). The analysis pays attention to the cognitive dimensions of the Pact, and how they affect trust and legitimisation of EU migration and asylum policies. By 'cognitive dimensions' this Chapter means the ensemble of cognitive work that needs to be done to put into effect the core priority underlying the Pact. This comprises "establishing status swiftly on arrival" at Schengen external borders and categorising individuals either as "non-returnable refugees and other beneficiaries of international protection", or as "expellable irregular immigrants". Accordingly, individuals would be either immediately refused entry or transferred to asylum or return procedures.

1.2 Whose Pact? Intergovernmentalising EU asylum and migration policies

The idea of a ‘European Pact’, as originally advanced by Commission President von der Leyen at her Opening Statement in July 2019, not new (von der Leyen, 2019). It originated in a 2008 proposal advanced by the French Presidency of the EU for a European Pact on Immigration and Asylum (European Council, 2008). This earlier ‘Pact’ was criticised as a failed attempt by one Member State to ‘renationalise’ policies falling under clear EU competence and scrutiny under the Treaties, and catapult some domestically contested priorities into common EU policy agendas through an intergovernmental arrangement (Guild and Carrera, 2008).

A prior question that can be asked is what exactly is a pact, and between whom is it concluded? A pact implies an agreement or an official promise (or engagement) between two or several parties. It does not always qualify as a treaty or international agreement. The terminology of a pact may therefore lead to confusion, and it is not entirely clear *to whom* the new Pact in question actually belongs, and between whom it has been concluded or agreed upon. The Pact on Migration and Asylum does not, in fact, qualify as a pact.

To be clear, the Pact envisages the European Commission policy agenda aimed at setting up a “Common European Framework for Migration and Asylum Management” during the (current) 9th EU legislature. The Commission alone is the owner of this Pact. Moreover, while the Commission has carried out long consultations and informal exchanges with EU Member States and other actors, this does not formally mean that the Pact has been concluded or agreed in any way or form by any of these national governments (Euractiv, 2020) or the European Parliament.

In fact, one may wonder if the EU actually needs a Pact at this advanced stage of European integration. The EU Treaties are clear about the fact that inter-institutional decision-making rules among EU Member States and the European Parliament come into effect once the Commission officially presents or publishes any new legal acts. This also applies in full to migration, asylum and border policies.

One of the expressly stated objectives of the Pact is promoting and reinforcing “mutual trust” through asylum policies “acceptable to *all* EU Member States”. It says that it has been “shaped by collective learning”

from the inter-institutional debates during the previous Juncker Commission, particularly the failing Commission's 2016 proposals to reform the Common European Asylum System (CEAS) and the EU Dublin Regulation (European Parliament and Council, 2013). However, if there is any lesson to be learned from the outputs of inter-institutional negotiations over the Commission's package of 2016 legislative proposals to reform the EU Dublin Regulation, it is that allowing a decision-making logic of consensus or *de facto* unanimity among EU Member States does not work at all.

Previous CEPS research has shown that the 8th legislature corresponding with the Juncker Commission was characterised by intergovernmental and nationalistic logics "in the name of the 2015 European refugee crisis" (Carrera, 2018). The European Council and EU Member States' ministries of interior – some of which were in the hands of radical right-wing parties – played a central role in re-injecting intergovernmentalism and 'flexible' patterns of cooperation in communitarised policies. They were the ones responsible for blocking the 2016 Commission CEAS reform by insisting on negotiating all the legislative files as a 'package' dependent on the Dublin regulation's revision.

This was despite the existence of a broad understanding and overwhelming amount of evidence that the first irregular entry rule for distributing responsibility for assessing asylum application carried profound deficits and should be abandoned, and the European Parliament calling for much-needed asylum reform based on equal solidarity (European Parliament, 2016). This intergovernmental logic was in clear violation of the Treaties and the QMV – and not the unanimity – rule applicable under the ordinary legislative procedure to migration and asylum policies (Carrera et al., 2020).

The Pact runs the risk of resurrecting the artificial need to build consensus among EU Member States – even in advance of the presentation of the actual legislative proposals. This is both risky and counter-productive in policy domains where one could expect the Commission to pursue a genuine Migration and Asylum Union (Carrera and Lannoo, 2018).

The 2009 Lisbon Treaty aimed quite deliberately to change previous intergovernmental and nationalistic modes of cooperation in Justice and Home Affairs (JHA). As a key condition for 'merited or deserving trust',

the Treaties require that common EU policies on borders, asylum and migration must be negotiated among *all* European institutions, not only among Member States. The ‘Lisbonisation’ of JHA meant recognising the European Parliament as a full co-legislator and co-owner in these policy areas, and unlocking judicial control held by the Luxembourg Court.

A consensus-building strategy among EU Member States makes no sense in light of EU Treaties. Intergovernmentalising EU policy-making in these domains is illegal and at odds with the inter-institutional balance and loyal cooperation foreseen in the Treaties. Furthermore, the methodology applied in the Pact has resulted in a number of ‘early concessions’ to some EU ministries of interior before the actual publication and start of inter-institutional negotiations of the accompanying legislative proposals. The risk here is that currently applicable and debatable national policies and practices – some of which have been found unlawful by European Courts and human rights bodies – will be reshaped into ‘EU’ ones.

A case in point is the priority given to fast screening procedures at EU external borders, or the call for mandatory border procedures and safe-country notions. Some EU governments like the one of Germany advocated these ideas, which were openly stated in the Programme for Germany’s Presidency of the Council of the European Union (German Government, 2019; Council of the EU, 2020). One of the key problematic features of the Pact has been for some Member States to ‘transplant’ some of their own national priorities to the EU level, and in the Commission’s most important policy agenda document for the years to come in these areas. Little consideration has been given to the actual transferability of such restrictive ‘models’ to EU external land and sea borders in southern and central-east EU Member States in the Schengen Area. In particular, what is considered by some as a ‘best practice’ in some northern European countries may well become a ‘worst practice’ when travelling to other EU Member States and facing their local dynamics.

The current picture in the EU is that several governments are already implementing containment policies that are incompatible with existing EU asylum and migration law, the EU Charter of Fundamental Rights and the UN Global Compact on Refugees. These include for instance expedited expulsions or hot returns, accelerated determination procedures, expansive uses of detention and not rescuing people at sea and disembarking boats in their territories. Some Member States’ governments

may see this Pact as indirectly bringing supranational legitimacy to some of their national policies that have been widely criticised by international and regional human rights bodies for leading to rule of law and human violations running contrary to EU's constitutional principles. This could enable them to trump effective access to justice and violate the right to seek asylum and the prohibition of collective expulsions in the EU.

The Pact's proposal to set up a joint pilot project on a 'migration management centre' at the EU hotspot in Moria, Lesbos (Greece) is one example (Politico, 2020). This was recently burned down after protests in the camp (BBC, 2020). The Council of Europe Commissioner for Human Rights stated that the response to the protests should not lead to "more and longer detention" of the people (Commissioner for Human Rights, 2019). However, the joint pilot project (Task Force) runs a sound risk of legitimating the Greek government's policy on detentions and unlawful expulsions (European Commission, 2020j). It could set a worrying precedent of European Commission's support of detention camps inside the EU.

1.3 Localisation, speed and de-territorialisation

The Pact emphasises the external borders of southern and central/eastern EU Member States. It states that "The external border is where the EU needs to close the gaps between external border controls and return procedures". It pursues the idea of mandatory pre-border screening so that "entry is not authorised to third-country nationals unless they are explicitly authorised entry", and therefore that an application for asylum does not unlock "an automatic right to enter the EU" (European Commission, 2020d).

The Pact advocates a model that emphasises an accelerated decision as to whether an individual has access to the right to seek asylum at specific border crossing points identified by EU Member States. It pays special attention to third-country nationals who cross Schengen external borders at specific border crossing points designated by EU Member States, those entering in unauthorised ways - not fulfilling entry conditions in the Schengen Borders Code (European Parliament and Council, 2016), as well as those who are disembarked after search and rescue (SAR) operations at sea.

This model finds expression in the newly amended Proposal for an Asylum Procedures Regulation COM(2020) 611 final (European Commission, 2020c) – which applies to both asylum and return rules on border procedures, and the Proposal for a Regulation on screening at the external borders COM(2020) 612 final (European Commission, 2020d). During the envisaged ‘screening’ process, which is expected to be concluded within five days from apprehension in the external border area, disembarkation or presentation at border crossing points, individuals concerned are deemed as non-authorised to enter the Member State’s territory.

During this time, third-country nationals are obliged to remain in “the designated facilities during the screening”, which according to these proposals should be in principle at or in proximity to the external borders or transit zones. This therefore entails detention as a clear scenario. Moreover, this period can be extended to 12 weeks in cases where individuals appeal against a decision rejecting an application for international protection. It can further extended depending on the time needed to prepare return or implement the expulsion process envisaged in the EU Returns Directive, which has been under inter-institutional negotiations since 2018 (European Commission, 2018).

In light of the ‘cognitive dimensions’ of these two proposals, after mandatory pre-border screening procedures, individuals are expected to be either immediately refused entry into EU territory or be channelled into asylum or return procedures. The screening is supposed to cover identification, security checks - against EU databases such as the Schengen Information System II and their Interoperability (European Parliament and Council, 2019) - as well as registration of biometric data (fingerprints and facial recognition) in a new version of the Eurodac database allowing for an increased accessibility to asylum seekers data by the European Asylum Support Office (EASO) (European Commission, 2020f). It also includes health checks consisting of a preliminary medical examination “with a view to identifying any needs for immediate care or isolation on public health grounds”.

The Pact places EU agencies such as Frontex (European Border and Coast Guard) and EASO in the crucial role of operationally assisting Member States in the practical implementation of these initiatives. In the case of EASO this goes against its current legal mandate that at present

does not even foresee any procedure for withdrawing its operations in EU Member States not complying with EU law or fundamental rights. The increasing involvement of these EU agencies on the ground and their inputs in border procedures, however, raises a number of unresolved legal dilemmas related to their weak legal accountability and the lack of an independent monitoring mechanism of their activities and decisions (Carrera and Stefan, 2020).

To function, the pre-entry screening procedures would presuppose that the cognitive resources of the territorially distributed system are moved to the EU external borders. It is concerning, though, that EU Member States' border-crossing points are often framed as 'transit zones' or even as 'non-territory' in an unsuccessful attempt or legal fiction to reduce or limit their legal responsibilities and side-line constitutional and international rule of law.

This provokes the question as to whether a person in a liminal situation with a dearth of resources and reduced oversight is owed international protection and access to justice. The Pact's model – and its suggested 'principle of integrated policymaking' – risks blurring the lines between international protection and migration management by giving preference to the latter and engaging in the securitisation and criminalisation of refugees and people seeking international protection.

Speed is prioritised along with *localisation*, and comprises and calls for swift pre-entry screening of individuals who irregularly cross the external border outside designated border points and do not fulfil the conditions of entry. Crucially, pending the results of screening procedures, the person is presumed not to have legally entered into Member States' territory. In this way, the proposed policies can be expected to encourage *de-territorialisation*, i.e. EU Member States unlawfully reframing specific parts of their borders as 'non-territory' in an attempt to escape accountability and liability in cases of fundamental rights violations.

According to the Pact, "the particular needs of the vulnerable require special arrangements, and the border procedure would only apply where this is the case." The Proposal for a Regulation on screening at the external borders COM(2020) 612 final (Article 9) foresees the application of "vulnerability assessments" and highlights that those considered as vulnerable "shall receive timely and adequate support in view of their physical and mental health. This, however, allows potential for the foreseen

screening procedures to impact individuals' rights and agency. Little or no consideration is given to how these very policies, and the blurring between asylum and expulsions, actually co-create or are co-constitutive of the irregularity of entries and onward mobilities that its proposals seek to address (Carrera et al., 2019d).

Despite formalistic statements that these proposals generally comply with fundamental rights, border procedures are unquestionably characterised by reduced procedural safeguards leading to arbitrariness and discrimination (ECRE, 2019). They can also be expected to justify the illicit use of systematic deprivation of liberty of individuals at the borders or in-territory detention facilities.

Another problematic aspect is that the newly envisaged border procedure will deem an asylum claim inadmissible when the applicants come from countries with a low recognition rate (20% or lower according to a Union-wide average based on Eurostat data) – according to a new Article 40 of the Asylum Procedures Regulation. This is in violation of the inherently individual nature of any application for international protection. It also disregards the persistent major differences among EU Member States regarding recognition rates.

The newly amended Proposal for an Asylum Procedures Regulation COM(2020) 611 final builds on the results of inter-institutional negotiations on a previously recast Proposal published in 2016 (European Commission, 2016), which aimed to harmonise Member States' rules on the use of controversial safe country notions. While the harmonisation of this notion has been abandoned by the Pact, the new proposal still pursues the problematic idea to use 'safe third country' notions that would require Member States to expel legitimate asylum seekers to countries outside the EU where their safety and dignified treatment are not guaranteed. A joint letter issued by several NGOs on the Pact states that safe-country notions carry inherent risks for effective access to international protection and "contribute to containment of refugees in other regions and jeopardise efforts for a more balanced sharing of responsibility for people who are displaced globally" (ECRE, 2020).

The Pact's focus on localisation, speed and de-territorialisation seems to be inspired by current policies and ideas pursued or implemented by some EU governments. A key question is the extent to which these ideas can realistically be expected to be so easily transferred to Member States

holding the EU external land and sea borders in southern and central/eastern Europe. This is crucial in light of the increasing body of evidence of human rights and rule of law violations from governments' policies on pushbacks, hot returns, detention and expedited expulsions (Carrera, 2020; Carrera and Stefan, 2020)

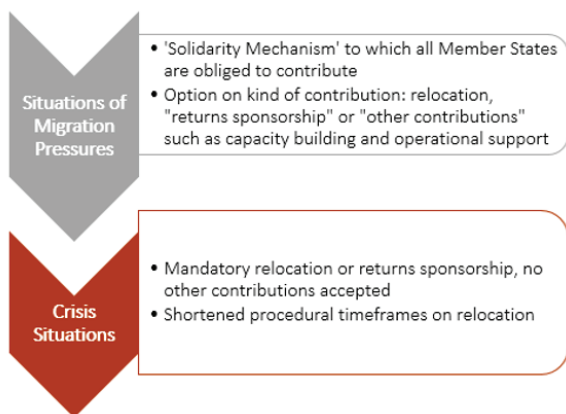
1.4 A European asylum system à la carte: asymmetric solidarity

The word 'flexibility' appears in several passages of the Pact. It relates to the reform of the EU Dublin Regulation, which currently outlines the rules for the sharing of responsibilities between EU Member States in assessing asylum applications in the Schengen area. While the Pact states that "solidarity is not optional", it advances a package of proposals implementing the concept of 'mandatory flexible solidarity' among EU Member States in the field of asylum and returns. It proposes reforming the EU Dublin Regulation in the shape of a new Asylum and Migration Management Regulation COM(2020) 610 final, which introduces a new 'solidarity mechanism' (European Commission, 2020f).

During the 2020 State of the Union debate President von der Leyen expressly stated that "We will abolish the Dublin System" (von der Leyen, 2020). However, the devil is in the details. The reform still keeps as a rule the much-debated first irregular entry criterion for determining responsibility among EU Member States, which will now also include people subject to SAR at sea. Among the envisaged set of criteria for determining the Member State responsible for examining an asylum application (which includes family links and specific provisions for unaccompanied minors), Article 21 still envisages the irregular entry rule. This means that the old 'Dublin rationale' for distributing responsibility remains under the new system.

As Graph 1 below illustrates, the proposed 'Common Framework' includes a *two-layered interstate solidarity model* ranging from what the Pact calls 'situations of migration pressures' to those labelled as 'crisis situations'. Both concepts – "migration pressures" and "crisis" - leave ample discretion in the hands of the Commission and EU Agencies.

Graph 1. Two-layered interstate solidarity



Source: Author's own elaboration.

In situations characterised as “migration pressures” or subject to disembarkations at sea, the foreseen solidarity mechanism in Article 45 of the Proposal obliges all Member States to participate in ‘solidarity contributions.’ However, Member States are given the choice of *how* they do this. They may freely decide to participate in relocations of applicants for international protection. These Member States would contribute according to a share based on pre-identified criteria (chiefly 50% population and 50% GDP) as stipulated in Article 54 and Annex III of the Proposal. The Proposal also envisages specific provisions related to the setting up of ‘solidarity pools’ in the context of SAR operations (Article 49).

The Member State could instead decide to contribute with ‘other measures to facilitate returns’ of irregular immigrants. These are called “return sponsorships” in Article 55 of the Proposal. This would include supporting the EU Member State facing ‘migration pressures’ on policy dialogues with relevant non-EU governments in the verification of individuals’ identity and their readmission. The Pact envisages that those Member States committing to provide return sponsorships will be obliged to relocate individuals concerned to their territories if they are not expelled within a period of eight months. Article 56 of the proposal

offers a third option for Member States to refuse relocation or return sponsorships, but contribute instead through capacity building and operational support.

The second type of *interstate solidarity model* corresponds with cases labelled as “crisis situations”, as outlined in the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum COM(2020) 613 final (European Commission, 2020e), which accompanies a Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint) (European Commission, 2020i). Here the Pact envisages mandatory relocation of applicants under international protection or return sponsorships. In such cases, Member States would not be allowed to participate through capacity building and operational support. According to the Pact a crisis would not only include “mass arrivals of irregular migrants, but also a political crisis or a crisis sparked by force majeure such as the pandemic”. It would also include cases where there is “an imminent risk of such a situation” (Article 1.2 of the Proposal). One is first left to wonder what a “political crisis” actually is, and how “the risk” could be objectively examined.

In cases labelled as “crisis situations” the Commission is proposing a “crisis migration management procedure covering both asylum and return”, which leaves EU Member States too much room for manoeuvre for lowering down or derogating basic international protection and human rights standards as follows: first, taking decisions on the merits of the application during border procedures; second, extending the length of pre-entry border screening and the presumption of non-entry into territory (Article 4 of the Proposal); third, further expanding the use of detention; fourth, applying a non-automatic suspensive effect of appeals of returns; and fifth, carrying out expulsions “to any third country where the person has transited, departed or has any other particular tie”.

The proposal also allows Member States to grant immediate protection status without the need for examining international protection applications in Article 10. This provision would apply to “displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin”, who would be granted subsidiary protection.

In the above-mentioned 2020 State of the Union address, President von der Leyen underlined the Commission's expectation that *all* Member States would step up to their common responsibilities. As explained above, however, the Pact promotes *differentiation*. It pursues a notion of solidarity that allows Member States' ministries of interior to free-ride or 'opt out' of delivering the fundamental right to seek asylum in the EU. Yet, why should it be acceptable that only a handful of Member States take responsibility for relocation and the EU Charter of Fundamental Rights, when others don't? And why give that option to some EU governments, such as Hungary and Poland, which are currently under Article 7 TEU procedures for engaging in systematic threats to the rule of law and institutionalised forms of discrimination and xenophobia towards refugees and migrants?

The Pact's inclusion of expulsions within the EU notion of solidarity reveals an interstate or intergovernmental understanding of EU responsibility sharing in the CEAS, where the individual's protections, rights and agency are left at the periphery. It also problematically expands the scope of the Lisbon Treaty principle of solidarity and the fair sharing of responsibility for expulsions, including third-country cooperation and readmission policy (See Section 4 below).

The Pact's notion of solidarity pays no attention to *solidarity towards individuals*, including undocumented migrants and applicants for and beneficiaries of international protection. It is regrettable that the individuals' own legitimate reasons to stay or go are not taken into consideration in the context of relocation or return sponsorships. This is particularly worrying in the context of return sponsorships, where individuals could be caught in a game of 'ping-pong' and be forced to relocate or involuntarily travel to Member States where they don't want to go. Moreover, the Pact should have made it clear that Member States are not free to choose or select applicants based on criteria such as nationality, ethnic origin or religion, 'integration potential' or even recognition rates, as these clearly amount to discrimination prohibited under EU law and international refugee law (Carrera et al., 2019d).

Flexibility is clearly not a panacea. There are several lessons to be learned from the recent experiences of relocation and disembarkation arrangements implemented in the Mediterranean during 2018 and 2019 (Carrera and Cortinovis, 2019b). They have left too much room

for manoeuvre in the hands of EU Member States, putting the Commission in a weak coordination and dubious diplomatic role that goes well beyond its competences as ‘guarantor of the Treaties’. They also lack any meaningful tools to ensure their enforcement and the full compliance with existing EU asylum and border legal standards in the various phases that comprise their practical implementation, including the involvement of Frontex and EASO.

Flexible solidarity is one expression of intergovernmentalism (Carrera and Cortinovis, 2019c). It leads to fragmentation in European cooperation on an issue that lies at the very core of the EU’s foundations, and where *common* action is essential. The enjoyment of equal rights and benefits stemming from membership in the EU carry similarly equal responsibilities for Member States governments. Flexibility can be seen as ‘less EU’ and it weakens the possibilities for the EU to fully accomplish a harmonised immigration and asylum policy that is consistent, ‘common’ and integrated.

The Luxembourg Court has provided few hints as to the scope of the EU principle of solidarity in asylum policy. In its judgment of 2 April 2020 (Cases C 715/17, C718/17 and C719/17) *European Commission v Poland, Hungary and Czech Republic*, the Court found that these governments had violated their obligations to implement and participate in the Relocation Decisions 2015/1523 and 2015/1601. It also held that any practical issues must be resolved in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member State of relocation. The Court concluded that the responsibility towards Italy and Greece “...must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, which in accordance with Article 80 TFEU, governs the Union’s asylum policy.”

1.5 Externalisation

When it comes to prioritising expulsions orders, the Pact relies heavily on international cooperation instruments focused on ‘externalisation’, i.e. placing migration management at the heart of the EU’s external relations. These instruments take the shape of what the Pact calls ‘Migration Partnerships’, which are non-legally binding arrangements or ‘deals’

(not qualifying as international agreements) with non-EU countries. Examples are the EU-Turkey Statement or third country readmission arrangements with African countries such as Ethiopia, Ghana, Niger or Nigeria (Carrera et al., 2019a; Carrera et al., 2019b). They often come along with crisis-led funding instruments (e.g. EU trust funds), and give clear priority to expulsions, border management, countering human smuggling, and the facilitation of readmissions and returns.

Despite the many legal and practical challenges characterising the implementation of EU Readmission Agreements (Carrera, 2016), the Pact continues with the long-standing EU policy position that “readmission must be an indispensable element of international partnerships”. The importance given to readmission in the Pact is also reflected in Article 7 of the Proposal for a new Asylum and Migration Management Regulation COM(2020) 610. The focus on readmission means that EU Migration Partnerships can be better understood as Insecurity Partnerships (Carrera and Hernández i Sagrera, 2009). These are premised on the Pact’s readmission priority, which is closely interrelated to visa facilitation/liberalisation-conditionality, development cooperation, trade policies and investments. The Pact expressly foresees the possibility of applying restrictive visa measures to nationals of countries not cooperating on readmission.

The Pact confirms the EU’s commitment at the UN Global Refugee Forum of December 2019 “to providing life-saving support to millions of refugees and displaced people, as well as fostering sustainable development-oriented solutions”. However, it then emphasises that development cooperation “will continue to be a key feature in EU engagement with countries, including on migration issues”. Such an EU-centric approach contradicts the UN GCR objective for development assistance to ensure a true “spirit of partnership, the primacy of country leadership and ownership”.

Furthermore, and based on examples such as the EU-Jordan Compact (Panizzon, 2019), the Pact pursues a ‘root causes approach’ aimed at misusing trade and investment policies at the service of containment, or as deterrence tools for preventing refugees from reaching the EU. More attention needs to be paid to how these initiatives affect or change the distribution of the overall workload or the tasks involved in implementing the cognitive dimensions of the Pact by third countries while upholding

human rights, international labour standards and the rule of law in international relations.

All this reveals a thematic intersectionality in EU external migration policies and a continued focus on migration management as insecurity. The Pact gives no consideration to the lessons learned from the ineffectiveness of past so-called 'Partnerships'. It pays no attention to their negative impacts on African countries' regional integration processes on free movement and regional human rights' systems. The attempt to transfer and implement EU migration management and crime-control concepts and projects often do not match up to local socio-economic realities in relevant non-EU countries. They generally lead to harmful effects, including the nurturing of insecurity, illiberal agendas, and economic inequalities and human rights' violations.

The Pact explicitly refers to the UN Global Compact on Refugees in its Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways C(2020) 6467 (European Commission, 2020h), which names the Global Refugee Forum and UNHCR's three-year strategy (2019-2021) on resettlement and complementary pathways. It calls on EU Member States to "take a global leadership role on resettlement" and "counter the current trend of a decreasing number of resettling countries globally and a sharp drop in resettlement pledges" (UNHCR, 2020). It also calls on Member States to participate in the EASO Resettlement and Humanitarian Admission Network, which blurs its relationship with the global and international protection-based role played by UNHCR in this same domain.

In addition to resettlement, the Recommendation includes a call to develop "other forms of legal pathways to Europe for vulnerable people in need of international protection", such as "humanitarian admission models" (including through study and work-related schemes), "Talent Partnerships" and community and private sponsorships. While all these instruments are officially presented in the context of 'mobility', some of these constitute examples of a 'contained mobility approach' (Carrera and Cortinovis, 2019a). These combine containment aspects, e.g. non-admission and non-arrival policies, with others on mobility that present selective, discriminatory, exclusionary and restrictive features.

By way of illustration, key challenges in the design and implementation of resettlement and other humanitarian admission programmes include the obligation to ensure the integrity, certainty and non-discriminatory nature of their selection and eligibility procedures, as well as their additionality to access to asylum. According to UNHCR, resettlement is “a tool to provide protection and a durable solution to refugees rather than a migration management tool”, and it is not “an alternative to providing access to territory to asylum seekers” (UNHCR, 2016). However, the 2016 Commission proposal on a Union Resettlement Framework has been criticised for including (among the factors for choosing priority countries for resettlement) their cooperation on readmission and their use of safe-country notions (Carrera and Cortinovis, 2019a).

1.6 Refugee protection, human rights and the rule of law

The UN GCR is “grounded on the international refugee protection regime” and “is guided by relevant international human rights instruments”. The dual understanding of individuals as either ‘non-returnable refugees’ or ‘expellable irregular immigrants’ carries major implications for refugee protection and human rights more generally. It artificially and wrongly relabels people with legitimate claims of international protection as irregular immigrants or expellable asylum seekers. The Pact’s priorities of *localisation*, *speed* and *externalisation* lay bare central questions of legal responsibility and accountability by state authorities and other implementing actors (including EU Agencies like Frontex and EASO) in cases of human rights’ violations and/or non-compliance with EU law.

Flexibility does not apply with respect to safeguarding international refugee law and human rights. All Member States abide by a commitment to effectively respect and protect the fundamental rights of all immigrants, irrespective of their administrative status and means of arrival (Carrera, Lannoo, Stefan and Vosyliute, 2018). Similarly, non-EU governments are subject to the scrutiny of international and regional human rights systems and monitoring bodies and courts. The dualistic framing of people pursued by the Pact poses challenges to the very essence of the rule of law, including the unnegotiable duty to avoid arbitrariness by state authorities, and to ensure human dignity and access to justice for *everyone* (Carrera, 2020).

Moreover, contrary to the de-territorialisation strategy characterising

the Pact's pre-border screening and border procedures, the obligation to comply with international refugee law and human rights and EU law is not limited to what is legally framed by states as 'territory'. Responsibility and liability for rights violations actually follow any actions or inactions by Member States and EU Agencies irrespective of where they happen as they are captured by *de facto* or *de jure* control notions, and fall within the scope of EU legislation or autonomous concepts of EU law such as 'detention' (Carrera et al., 2018).

The Pact's Proposal for a Regulation on screening at the external borders COM(2020) 612 final, in Article 7, provides for the obligation by EU Member States to set up "an independent monitoring mechanism". This mechanism aims to safeguard fundamental rights "in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement". The Proposal calls on Member States to ensure that individual complaints are dealt with "effectively and without undue delay."

The proposal for a fundamental rights' mechanism is most welcome in light of the many barriers to effective remedies and justice that individuals face in the context of border management procedures. However, any such complaint mechanism can only be meaningful if its effectiveness and independence from national authorities and relevant EU agencies (e.g. Frontex) is fully guaranteed (Carrera and Stefan, 2018), and if it covers the entire range of border procedures, including – and especially – in relation to those foreseen in what the Pact calls "crisis situations".

The proposal correctly emphasises the need to guarantee the independence of such a mechanism, and to ensure a key role by the EU Fundamental Rights Agency (FRA) to support and provide guidance to Member States in its establishment. To this end, such a 'Border Monitor' should envisage a key role for the European Ombudsman, and its network of national ombudspersons as well as national Data Protection Authorities (DPAs). It should also make sure that individuals have effective access to procedures, chiefly legal aid and civil society actors and human rights defenders, which should not be criminalised or policed in any way or form in their independent provision of humanitarian assistance and SAR activities (European Commission, 2020g), as well as in their role as fundamental rights watchdogs and key sources of social trust in democratic societies (Carrera et al., 2019c).

1.7 Conclusions

The new Pact on Migration and Asylum ‘sets the tone’ of the European Commission’s policy priorities on migration, borders and asylum during the EU’s 9th legislature. The Pact gives priority to Member States’ agendas in an area where the EU already benefits from legal competence under the EU Treaties, where there are solid common EU legal standards, and where QMV and the co-legislator role by the European Parliament strictly applies.

The Pact does not pursue a genuine Migration and Asylum Union. It runs the risk of pursuing intergovernmentalism, of establishing a European asylum system of *asymmetric interstate solidarity* and legitimising Member States’ policies focused on speed, localisation and externalisation. EU Member States should be held accountable to their legal responsibilities, including under current CEAS and Schengen Borders Code standards. *Solidarity towards individuals* and the upholding of everyone’s rights and dignity needs to be placed at the heart of EU policies.

Inter-institutional negotiations will follow the legislative proposals that the Pact comprises. These should focus on initiatives that prioritise effective access to effective remedies, independent monitoring and evaluation of Member States and EU agencies’ compliance with international and EU human rights and rule of law standards, in full compliance with the EU Treaties and the UN GCR. These are the essential preconditions for the mutual trust principle to stand in EU migration, borders and asylum policies.

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2. The Pact and Refugee Resettlement: Lessons From Australia and Canada

Adèle Garnier

2.1 Introduction

Most refugees in the European Union (EU) are granted protection following an asylum claim on EU territory. Yet the new EU Migration and Asylum Pact strongly supports the expansion of refugee resettlement. This Chapter explores whether there are lessons to be learned from two countries in which most refugees are admitted through refugee resettlement: Australia and Canada.

The Australian and Canadian experiences show that refugee resettlement is strengthened by inclusive politics and civil society involvement in resettlement policies. Still, resettlement remains a marginal contribution to international protection. Hence, the contribution recommends that the EU strongly support inclusive resettlement politics and policies while strengthening access to asylum, which should remain the main instrument of humanitarian protection in the EU.

2.2 Expansion and increased advocacy for resettlement in the EU

Refugee resettlement is the voluntary admission by states of refugees from countries in which it is not sustainable for them to stay (Garnier et al., 2018). Contrary to asylum, resettlement is not codified in international law.

In the last decade, refugee resettlement to European Union (EU)

Member States has significantly increased, from 4,050 resettled refugees in 2011 to 24,815 in 2018 (European Commission, 2019). Between October 2017 and October 2019, EU Member States pledged to resettle 50,000 refugees, yet resettled 37,520 over this period (Wills, 2019). 14 Member States (including the United Kingdom) have pledged to resettle almost 30,000 refugees in 2020 (European Commission, 2020a). In the EU Migration and Asylum Pact, this pledge was made to cover 2020 and 2021 (European Commission, 2020b: 22) to account for resettlement delays caused by travel bans adopted in response to the COVID-19 pandemic (Garnier, 2020).

The development of an EU-wide resettlement framework has been promoted by the European Commission since 2000 (Garnier 2014). EU funding has been made available to support resettlement places in Member States as well as multi-stakeholders initiatives promoting resettlement, such as the European resettlement network (European Resettlement Network, n.d). A draft directive aiming to establish an EU joint Resettlement Framework has been in the legislative pipeline since 2016, yet negotiations between the European Parliament and the Council have not progressed since 2018 (European Parliament 2021).

In 2017, then EU Migration Commissioner Dimitris Avramopoulos stated that refugee resettlement ‘should become the preferred way for refugees to receive protection’ (European Commission, 2017). The EU Migration and Asylum Pact unveiled on 23 September 2020 (European Commission, 2020b) demanded that the EU resettlement efforts be ‘scaled up’, with the recommendation to adopt a Framework Regulation on Resettlement and Humanitarian Admission (European Commission, 2020c).

Yet EU Member States admit far more refugees following an asylum claim on EU territory. In 2019, 109,000 persons were granted refugee status in the EU (Eurostat, 2021). A further 52,000 were granted subsidiary protection and 45,100 the authorisation to stay for humanitarian reasons. The EU Commission argues that refugee resettlement ‘helps save lives, reduce irregular migration and counter the business model of smuggling networks’ (European Commission, 2020c: 2). The Commission thus presents resettlement as an alternative to seeking asylum after an irregular migration journey.

What about refugee resettlement in countries in which most refugees

are admitted through resettlement? Are there lessons to be learned? The following highlights Canada's and Australia's refugee resettlement experience with a focus on relations between resettlement and asylum; on the role of civil society in resettlement policies; and on contributions to international protection, to draw lessons for the EU.

2.3 Canada's and Australia's refugee resettlement

2.3.1 Resettlement vs asylum?

Given that refugee resettlement is not based on international law, politics can play a considerable role in expanding or contracting refugee resettlement. Most strikingly, the United States of America (US), the traditional resettlement leader, have drastically reduced resettlement admissions under the former Trump administration (Krogstad, 2019) as part of a broader anti-immigration agenda (Pierce and Bolter, 2020).

Canada and Australia have long been in the top 3 of countries resettling the most refugees and in the last decade experienced resettlement increases (Cellini, 2018). Yet in Canada, contrary to Australia, resettlement was not framed as an alternative to asylum.

In Canada, the death by drowning of Syrian boy Alan Kurdi in Turkey contributed to a strong pro-resettlement mobilisation in the wake of the 2015 federal election campaign (Parry, 2015). Justin Trudeau's centre-left Liberal Party promised to resettle 25,000 Syrian refugees within three months if the Liberals won the 2015 federal election. Once on power, the Trudeau government delivered on its promise (Associated Press, 2016), though this timeline was judged too ambitious at the time by some immigrant settlement organisations (CBC News, 2015). Canada has since slightly increased the country's annual resettlement intake compared to before 2015 and is now the world's resettlement leader (Radford and Connor, 2019). Canada resettled 28,076 refugees in 2018 (Immigration, Refugees and Citizenship Canada, 2019).

Canada's resettlement increase was not related to an increase of asylum claims on Canadian territory. Still, asylum claims in Canada have considerably increased since 2015. Canada's political rhetoric on asylum is warier than political discourse on resettlement (Canadian Press, 2018),

yet Trudeau has stressed the legitimate nature of asylum claims made at its borders, and has increased resources to be able to deal with up to 50,000 asylum claims by 2021 (Immigration, Refugees and Citizenship Canada, 2019).

Australia experienced two resettlement increases in the 2010s, one of which was tied to increased restrictiveness towards asylum-seekers. In 2012, Australia's resettlement intake increased by 40% to 20,000 places under the centre-left Labor government of Julia Gillard (Gillard, 2012). Such increase had for years been promoted by refugee advocates (Refugee Council of Australia, 2012). Yet it occurred in the context of a very significant increase of asylum claims made by people who had arrived in Australia by boat (dubbed 'irregular maritime arrivals', IMAs). However, the resettlement increase, according to the Prime Minister, targeted 'those in most need: those vulnerable people offshore, not those getting on boats'. IMAs would get 'no advantage' in gaining access to humanitarian protection in Australia (Gillard, 2012). In fact, at the same time of the resettlement increase, Australia reintroduced its earlier policy of processing IMAs' asylum claims in other countries in its region, the so-called Pacific Solution (Davidson, 2016).

The centre-left Labor government of Kevin Rudd, in 2013, introduced a ban on the grant of permanent protection in Australia to IMAs (Rudd, 2013). Yet Labor lost the 2013 federal election to the centre-right Liberal/National Coalition of Tony Abbott. Abbott's main campaign slogan had been 'stop the boats' (Rourke, 2013). His government returned the resettlement intake to its pre-2012 level of 13,750, until it was pressured by civil society and state governments to increase resettlement in response to the Syrian crisis (Yaxley, 2015). This led to the one-off resettlement of 12,000 Syrian and Iraqi refugees between 2015 and 2017 (Woodley, 2015), followed by an increase of the country's annual resettlement intake to 18,750. Australia's refugee politics demonise asylum-seekers. A recent government-sponsored review argued such rhetoric had a nefarious impact on refugees at large (Shergold et al., 2019). The Australian government delayed the release of its findings by several months (Stayner, 2019).

2.3.2 Civil society involvement in resettlement policies

In Australia and Canada, civil society mobilisation played a key role in increasing resettlement. This role is, overall, more institutionally entrenched, and more incentivised, in Canada.

One policy step at which Australian civil society appears to play a greater role is in consultations ahead of the government's announcement of the annual resettlement intake. The Refugee Council of Australia, the peak body representing Australian refugee advocates, releases an annual report presenting community views on the country's refugee intake (see, for instance, Refugee Council of Australia, 2018). These views are taken in consideration in policy design (UNHCR, 2018: 4). Though dialogue between its Canadian equivalent, the Canadian Council for Refugees, and the immigration bureaucracy, is sustained, there is no such annual report in Canada. Australia's consultative process is laudable. Yet it is no guarantee the government will listen.

Canadian civil society is essential to the country's private refugee sponsorship program (Immigration, Refugees and Citizenship Canada, 2020). Groups of at least five Canadians, as well as larger organisations, can enter agreements with the Canadian government to financially support the arrival and settlement of people in refugee and refugee-like situations. Private refugee sponsorship was formally established in the 1970s in the context of the Indo-Chinese refugee crisis and legal scholar Audrey Macklin has called it a 'permanent component of immigration policy' (Macklin, 2018). Today, most resettled refugees in Canada are privately sponsored rather than assisted by the government of Canada. In 2018, 18,156 resettled refugees were privately sponsored and 8,156 were government-assisted (Immigration, Refugees and Citizenship Canada, 2019).

In 2015, when Trudeau announced its electoral promise to resettle 25,000 Syrian refugees within 3 months, hundreds of local groups signalled they were ready to sponsor (CBC News, 2015). The Trudeau government supports the Global Refugee Sponsorship Initiative, through which Canada public authorities, private organisations and the United Nations' High Commissioner for Refugees (UNHCR) foster the establishment of refugee sponsorship programs overseas (Global Refugee Sponsorship Initiative, n.d.).

For decades, Australia has also allowed private individuals to sponsor the resettlement of refugees and people in refugee-like situation, yet without encouraging sponsors' direct involvement in refugee settlement once in Australia.

Following strong civil society demands for a scheme akin to Canada's private sponsorship, a community sponsorship program was eventually piloted in 2013 (Department of Home Affairs, 2018). Its capacity is 1,000 places yet this quota has never been filled. In 2018/2019, 563 refugees were resettled as part of this stream, in contrast to 7,098 whose admission was supported by individuals, and 9,451 government-assisted refugees (Department of Home Affairs, 2020). Refugee advocacy groups (Refugee Council of Australia, 2019) and scholars (Hirsch et al., 2019) have been highly critical of the community sponsorship program's narrow eligibility criteria, such as evidence of an employment offer and English proficiency, as well as its exorbitant cost. Notably, Australia does not participate in the Global Refugee Sponsorship Initiative.

2.3.3 Contribution to international protection

Canadian and Australian politicians (Glavin, 2019; ABC News Factcheck, 2018) insist on their countries' generosity through their substantial contribution to global refugee resettlement. Yet less than 1% of the world's refugees are resettled each year, whereas more than 80% of the world's 26 million refugees reside in developing countries, mostly close to their countries of origin (UNHCR, 2020).

For this reason, even resettlement advocates acknowledge that the 'protection dividends' of investments in resettlement programs are considerably smaller than support to refugees in regions of origin, while some populations, such as Syrians, have in recent years far more strongly benefitted from resettlement than others, particularly African refugees (Macklin, 2018).

Strong emphasis on the vulnerability of resettled refugees has its ambivalences as it can devalue refugee agency (Neikirk, 2017). Resettled refugees may be perceived as victims who contribute less to their countries of admission than other categories of immigrants, rather than people able to advocate for themselves through long and complex resettlement procedures (Sandvik, 2011) and dealing with considerable structural disadvantages in host societies (Jenkinson et al., 2016).

2.4 Which lessons for the EU?

In contrast with EU Member States, Canada and Australia admit most refugees through resettlement rather than following an asylum claim. This Chapter recommends against the adoption of resettlement as the main mode of refugee admission to the EU because resettlement is not based on international law and is highly sensitive to domestic politics. Rather, the Chapter recommends emphasising additionality between refugee resettlement and asylum and stressing that far more solidarity is needed with developing countries, as developing countries host most of the world's refugees.

In the context of an increased focus on global solidarity, the Canadian resettlement experience can be a model for EU Member States in terms of inclusive politics and civil society involvement. In this respect, the Pact's incentivisation of community sponsorship (Tan, 2020; see Chapter 6) is a step in the right direction. More EU Member States should be encouraged to take part in the Global Refugee Sponsorship Initiative supported by Canada.

By contrast, the Australian experience shows that pitching resettlement against asylum not only demonises asylum-seekers, but also worsens the settlement experience of all refugees. It is to hope that the EU will in the future refrain from framing resettlement as an alternative to asylum. This framing risks further shrinking EU citizens' willingness to welcome any refugee in addition to reducing the availability of humanitarian protection.

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3. The New Pact On Migration and Asylum and The Global Compact on Refugees and Solutions

Geoff Gilbert

The United Nations Global Compact on Refugees (GCR) of 2018 is a document that tries to embrace all aspects of forcible displacement across international borders in the 21st century (UNGA, 2018). This Chapter's review of the new EU Pact will focus principally on how it might facilitate solutions for displacement in relation to the GCR, but necessarily there first has to be some more general analysis.

3.1 The GCR as framing the argument

The GCR may not be binding in international law (UNGA, 2018: paragraph 4), but it still gives rise to commitments for the international community as a whole. Its two principal elements pertinent to this discussion relate to burden- and responsibility-sharing and its focus on solutions.

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and the 1950 Statute of the United Nations High Commissioner for Refugees (UNHCR) are directed towards protection of refugees in the country of asylum, not so much on the inevitable burden that providing protection entails, nor the ultimate protection, a durable and sustainable solution to their displacement (UNGA, 1950; UNHCR, 1951; UNHCR 1967). Paragraph 4 of the Preamble to the 1951 Convention did call for international co-operation:

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of

a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

Nevertheless, it took until the GCR in 2018 to put “flesh” on those bare bones. As UNHCR figures show, there are 79.5 million displaced persons of concern to UNHCR, of whom 20.4 million are refugees and 4.2 million are asylum seekers; 73% live in neighbouring countries to those that they have fled, often alongside the 45.7 million internally displaced persons (IDPs) who are also of concern to the organisation.¹ Of the top five hosting states, only Germany is in the global north: 80% of displaced persons of concern to UNHCR live in states where there is acute food insecurity and malnutrition.

In these circumstances, where the modal average length of a situation of displacement is around eighteen years, it is little wonder that the development actors play such an important role in the GCR, while UNHCR maintains its unique protection mandate for all refugees, including asylum seekers and returnees without a durable and sustainable solution.

Some aspects of the new EU Pact have a direct impact on how the GCR's guiding principles and objectives (UNGA, 2018: paragraphs 5 and 7) are to be achieved – as the new Communication on the new Pact (European Commission, 2020a: 18) states, the EU is the “the world's major development donor”.

As regards durable and sustainable solutions, the traditional three are voluntary repatriation, resettlement or local integration. The GCR recognised a fourth means for responding to displacement, complementary pathways for admission to third countries (UNGA, 2018: paragraphs 94-96). There is, however, language in those paragraphs that indicates that complementary pathways are not durable and sustainable, with references to student scholarships and labour mobility. If the objective is to provide the refugee with the sustainable international protection of a state rather than that upheld by UNHCR under its mandate, then studentships and labour mobility schemes do not offer that guarantee, at least in the first instance, although they may facilitate one of the traditional durable solutions and provide the refugee with the capacity to resolve their own situation.

¹ This year's figures include 3.6 million Venezuelans displaced abroad, alongside the 93,300 refugees and 794,500 asylum seekers – 4.5 million Venezuelans in total.

3.2 The new EU Pact and the GCR

It is always worth mentioning that the EU's approach of joining asylum with migration is fundamentally flawed, regardless of how long they have persisted with it. Asylum is about protection and immigration is about controlling borders (Gilbert, 2004; Carrera, 2020).

The idea that the new EU Pact's focus should be "a common framework for asylum and migration management at EU level as a key contribution to the comprehensive approach and *seeks to promote mutual trust between the Member States*" does undermine the primacy of refugee protection as set out in the EU Proposal for a Regulation (European Commission, 2020b: 2).

Nevertheless, in the context of solutions, some aspects of the new Pact may be facilitative (see European Commission, 2020c: paragraphs 3 and 6). Equally, those elements relating to prevention, development aid and migration as a way to end refugee status and protect the dignity of refugees could be helpful (see European Commission, 2020a: §§6.2, 6.3, 6.5).

3.2.1 Prevention

The cynical view within the 1990s was that there was no such thing as post-conflict, just a pause before it was pre-conflict again. Nevertheless, the link between development assistance and prevention is well established and is even built into the Responsibility to Protect (UNGA, 2005: paragraph 139; Gilbert, 1998):

139 ... We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The new EU Pact takes this further and should be read with paragraphs 8 and 9 of the GCR (UNGA, 2018):

8 ... In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

In line with the Sustainable Development Goals, the international community, including the EU, should provide development assistance (UNGA, 2015). The new EU Pact takes a similar line in §6.3 when it asserts that (European Commission, 2020a):

Conflict prevention and resolution, as well as peace, security and governance, are often the cornerstone of these efforts. Trade and investment policies already contribute to addressing root causes by creating jobs and perspectives for millions of workers and farmers worldwide. Boosting investment through vehicles such as the External Investment Plan can make a significant contribution to economic development, growth and employment.

On the other hand, while the new Pact has some useful language regarding long-term prevention through addressing root causes, there are other references that indicate an EU-centric attitude that will not affect global fairness and reduced displacement. In the new EU Pact, §2.4 of the document talks about how “[the] new Asylum and Migration Management Regulation will ... improve planning, preparedness and monitoring at both national and EU level”, rather than solidarity with the states in low- or middle-income countries who host 83% of the world’s refugees according to UNHCR (European Commission, 2020a: §2.4; UNHCR, 2019: 25); as such, the focus once again seems to be on averting another 2015 European asylum crisis that never was a crisis given the wealth of EU Member States and the very limited numbers they were dealing with by comparison with many other low- or middle-income countries (UNHCR, 2019: 25, Fig.2).

3.2.2 Burden- and responsibility-sharing and local integration

Predictable and equitable burden- and responsibility-sharing is fundamental to all of the GCR (UNGA, 2018: paragraph 3). In this particular context, given the protracted nature of most displacement crises and that most displaced persons only cross one border according to the World Bank (2017: 23), supporting the low- or middle-income countries who host most refugees is part of the solution to the crisis. Solutions start from the moment of protection, as human rights and the rule of law protect refugees in the country of asylum.

The traditional durable and sustainable solutions are the endpoint of an international protection framework that is based on resolving the issues to which displacement gives rise: denial of access to education, employment and healthcare, interference with the guarantees the rule of law should offer, and the upholding of human rights. Some of the new Pact targets these problems refugees face during their situations of displacement. The new EU Pact states at §6.2 that (European Commission, 2020a: §6.2):

... [The] EU is determined to maintain its strong commitment to providing life-saving support to millions of refugees and displaced people, as well as fostering sustainable development-oriented solutions.

Nevertheless, this is a perfect example of why the new Pact might be evidence of hope triumphing over expectation. Niger has provided incredible support to forcibly displaced persons for years,² but according to the UNDP Human Development Index for 2020 (UNDP, 2020), Niger came 189th out of 189 countries. The EU should not be ‘solving’ forced displacement and providing protection through transfer to one of the poorest countries on the planet.

What is also true, however, is that whether formally or not, lots of forcibly displaced persons remain for protracted periods in the country of asylum and settle there. As will be seen, where voluntary repatriation is not possible, refugees have few options other than to make a new life in the country giving protection. The generosity of many countries of asylum in this regard, though, cannot be abused by the international

2 For further discussion, see Gilbert and Rüsch, ‘Rule of Law and UN Interoperability’, 30, *International Journal of Refugee Law*, 31 at 35 and fn.136, (2018).

community and, thus, EU initiatives with respect to development, also indicated in the new Pact, will inevitably play a large part in solutions. According to the new EU Pact §6.3 (European Commission, 2020a: §6.3):

The EU is the world's largest provider of development assistance. This will continue to be a key feature in EU engagement with countries, including on migration issues. Work to build stable and cohesive societies, to reduce poverty and inequality and promote human development, jobs and economic opportunity, to promote democracy, good governance, peace and security, and to address the challenges of climate change can all help people feel that their future lies at home.

It may not be what low- or middle-income countries hoped for during the Formal Consultations on the GCR, but without robust engagement with the source states, which have predominantly remained the same since the 1990s (World Bank, 2017: 23), voluntary repatriation will not resolve displacement crises.

3.2.3 Resettlement and complementary pathways

Resettlement is one of the classic durable and sustainable solutions, but it is less and less available, such that only for the most vulnerable will it provide a means of ending refugeehood. The Commission Recommendation on legal pathways to protection in the EU supports the expansion of resettlement programmes within the EU. But even so its impact on low- or middle-income countries that host so many refugees would still be minimal because the base figure is so low – 107,800 in a mere 26 countries worldwide in 2019 according to UNHCR figures.

The proposed Commission Recommendation on legal pathways to protection in the EU is a positive move by the EU, although the role of the European Asylum Support Office (EASO) alongside UNHCR needs to be further developed. Complementary Pathways are an additional solution listed in the GCR (UNGA, 2018: paragraphs 94-96), but whether they will always be durable and sustainable like the traditional ones is open to question. The EU Pact deals with one very specific aspect of this in §6.6, the migration control effected through visa requirements for short-term mobility.

The remaining aspects of the proposed Commission Recommendation on legal pathways to protection in the EU apply equally to resettlement and complementary pathways. The aim of trying to ensure that forcibly displaced persons do not have to resort to irregular migration or even people smugglers is to be commended (European Commission, 2020a: §6.6), but unless that reflects effective access rather than simply top slicing particular refugees based on limited skill sets that only suit EU Member States (European Commission, 2020c: paragraphs 19 and 21), then no noticeable change will take place. It will also reduce the skill-base in the country of nationality for when transition towards peace and stability can commence.

To start, resettlement is a humanitarian response that benefits refugees and the countries of first asylum, usually low- or middle-income countries, it is not a means by which to “match people, skills and labour market needs through legal migration” (§6.6, EU Pact). That might be applicable to complementary pathways, but not resettlement as is clear from the Pact’s own description of the Union Resettlement and Humanitarian Admission Framework Regulation. The Pact also encourages broader community engagement with resettlement programmes that again reflects positive aspects of the GCR (UNGA, 2018: see paragraph 91 read in the light of paragraphs 33-44).

3.2.4 Voluntary repatriation

Often spoken of as the most desired solution by refugees and countries of asylum, voluntary repatriation relies on restoration of human rights and rule of law in the country of nationality, along with substantial development initiatives. UNHCR can ensure that voluntary repatriation does lead to durable and sustainable solutions for returning refugees through monitoring, but the international community as a whole will provide the framework.

The EU has a major role to play in peace building and conflict resolution, not only as regards addressing the root causes, not just *vis-à-vis* prevention, but also to encourage voluntary repatriation (European Commission, 2020a: §6.3). While there is much in the new Pact on the economic initiatives and on return programmes where people do not require protection, more on restoring human rights, rule of law and good governance would have been welcome.

Conclusion

The Pact on Migration and Asylum has once again missed the opportunity to put the EU at the forefront of resolving the global displacement crisis. It focuses on internal EU concerns and aims at pushing the problem away, often with a cynical reference to how that will protect so many from the dangers they might face in trying to reach Europe. When only 17% of persons of concern to UNHCR were in high-income countries in 2019, the need to support low- or middle-income countries and to offer enhanced protection and assistance to refugees should have been the outward-looking drivers for this review. International protection standards have been sacrificed in the (vain?) hope of achieving a compromise within the EU.

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4. The Impact of the New EU Pact on Europe's External Borders: The Case of Greece

Eleni Karageorgiou

4.1 Introduction

One of Europe's major gateways since the early 2000s, Greece is, arguably, the European Union's asylum policy laboratory. It has long served as a stark reminder of the limits of European asylum solidarity (Karageorgiou, 2018) and of the shortcomings (den Heijer et al., 2016) of the so-called Common European Asylum System (CEAS) as reflected in the narrowness (Carrera and Guild, 2010) of the logic of its cornerstone, i.e. the Dublin system. This Chapter provides an analysis of the implications of the new EU Pact on Migration and Asylum (European Commission, 2020e), hereinafter 'the Pact', on countries located at the external borders of the EU, with focus on Greece.

The analysis highlights the extent to which measures on procedures, detention and expulsions proposed in the Pact, essentially, institutionalize a number of formal and *ad hoc* informal measures already carried out by Greece, which have made it hard for refugees to access asylum, have their claims examined in substance and rely on effective remedies. The transformation of these measures, from national practices within the context of an alleged temporary emergency situation into mandatory rules applicable throughout the EU, raise a number of questions concerning the self-proclaimed role of the EU as human rights guarantor in the region, the compatibility of EU law with international standards, and the fate of EU refugee policy.

The analysis proceeds in two parts: the first part provides a brief overview of the evolution of asylum policy in Greece. It discusses the ways in which the CEAS instruments have informed Greek law and policy, and the extent to which Greek policy itself has influenced developments at EU level (Section 4.2). The second part looks more specifically at the CEAS reforms suggested in the Pact in relation to procedures, detention, and expulsions and what these reforms imply for Greece and the EU's periphery more broadly (Section 4.3).

4.2 Greece and the constant state of 'crisis'

4.2.1 Phase one: The 'exceptionality' of the Greek case

The asylum situation in Greece has been treated as being at a constant state of 'crisis' since 2010 (UNHCR, 2010). Scarcity of resources and frustration against the inequality of the EU Dublin system has left Greece with little incentives to improve its piecemeal approach to asylum. After a series of infringement proceedings initiated against it in 2009 and 2010 concerning the implementation of the EU asylum *acquis*, Greece committed to reform its asylum and migration policy based on a national Action Plan (Progress Report Greek Action Plan, 2013).

Although progress has been made especially after the establishment of the new Asylum Service, access to asylum and reception conditions for international protection seekers remained challenging. European Courts have repeatedly condemned Greece for failing to respect the fundamental rights of migrants and applicants for international protection: inhumane detention conditions (Council of Europe, 2009b), asylum seekers' destitution (Council of Europe, 2011), and lack of procedural guarantees (Council of Europe, 2013) during refugee status determination (CJEU, 2011) and expulsion (Council of Europe, 2016) processes, as reported by the Council of Europe (Commissioner for Human Rights Report, 2009), the UN (UNHCR, 2010), NGOs (HRW, 2009), and civil society (Greek Council for Refugees, 2013).

4.2.2 Phase two: Syrian refugees and the 2015/2016 EU reception and solidarity crisis

As a response to increased asylum demands in peripheral EU countries in 2015, the EU adopted in the context of its Agenda on Migration (European Commission, 2015a) two solidarity measures: the 2015 emergency relocation decisions (Council of the EU, 2015a; Council of the EU, 2015b) and the 2016 EU-Turkey statement (European Council, 2016). Arguably, both measures have proved to be inadequate to relieve Greece from excessive administrative, procedural, and substantive burdens it faced following the arrival of a substantial number of refugees on its territory (on relocation, see Guild et al., 2017). Instead, as I have argued elsewhere (Karageorgiou, 2020), they have made sure that a new set of obligations is imposed on those states within the context of the “hotspots approach”.

The amendments introduced by the Greek government to domestic legislation in order to render those EU measures immediately operational have raised serious concerns for access to asylum and human rights (ECRE, 2016a). The Greek Law 4375/2016 enabled national authorities to adopt exceptional measures at the borders in line with the “hotspot approach”, considerably restricting the procedural guarantees available to asylum-seekers subject to border procedures contrary to European Courts case law (Council of Europe, 2015) and to the recast Asylum Procedures (e.g. Art. 35, 43) and Reception Conditions Directive (Art. 8). The processing of asylum applications on the Greek islands was designed to facilitate the return to Turkey of all “irregular” migrants and asylum-seekers arriving from there, broadening the possibilities for declaring an asylum application inadmissible, as envisioned in the EU-Turkey statement.

4.2.3 Phase three: Dealing with the consequences of the 2015/2016 crisis

In the aftermath of 2015, Greece remained with thousands of people stranded in overcrowded facilities on the Greek islands and in the mainland, following the reintroduction of temporary border controls applied by other EU Member States (Guild et al., 2015). At the end of 2019, Greece hosted approximately 186,200 (UNHCR, 2020a) refugees

and asylum-seekers, receiving more asylum applications in 2019 (EASO, 2020) than during the 2015/2016 crisis. Based on recent statistics, Greece has currently a backlog of nearly 100,000 asylum applications (Ansa, 2020).

Containment of refugees and asylum-seekers on the Greek islands has been the norm since 2015 (Costello, 2020), despite a ruling by the Greek Council of State in the opposite direction (ECRE, 2018). The newly introduced Law 4636/2019 on 'international protection and other provisions', essentially, crystallizes and advances already existing confinement and deterrence practices. Some of the major reforms introduced by the new Law have included increasing of the maximum detention time for rejected asylum-seekers, speeding up of refugee status determination procedures involving one judge, narrowing the definition of vulnerable groups by excluding persons suffering from PTSD and lowering the standard of protection a third country would have to provide to render an asylum seeker's claim inadmissible in Greece. These have been criticized as limiting protection contrary to European and international standards (Greek Council for Refugees and OXFAM briefing, 2020).

4.2.4 Current phase: The containment crisis

It is against the background described above that a number of humanitarian emergencies have been unfolding lately at the Greek-Turkish border and on the Greek islands. Following bombings in Idlib, Syria in February 2020, Greece violently (Amnesty International, 2020) refused entry to Syrians arriving at the Evros land border, following Turkey's decision to open the doors for asylum-seekers and refugees to leave its territory for Europe. The measures taken by Greece as a way to avert what according to the Greek government spokesman was "an organized, mass, illegal attack of violation of its borders" have been fully endorsed by the Council of the EU (Council of the EU, 2020).

From being the irresponsible gatekeeper and defector in earlier instances, Greece was now praised by the European Commission President for being Europe's *aspida* (shield) in deterring migrants and refugees from entering Europe (Rankin, 2020). On top of that, invoking an emergency situation, the Greek government passed a legislative act suspending the right to claim asylum for a month (ΦΕΚ Α'45, 2020), despite UNHCR's concerns about possible breaches of international

refugee law (UNHCR, March 2020). At the same time, criminal charges for those who did manage to enter Greece irregularly (HIAS Greece, 2020), and cases of extrajudicial detention (Stavis-Gridneff et al., 2020), were reported. In the same *non-entre* mind-set, Greece has been lately accused for engaging in clandestine expulsion practices whereby refugees confined in camps on Greek islands were forcibly sailed on international waters and then abandoned in inflatable life rafts (Human Rights Watch et al., 2020).

As regards the reception conditions on the hotspots, the EU hotspot in Moria, Lesbos has been described by the head of the EU's Fundamental Rights Agency, as “the single most worrying fundamental rights issue that we are confronting anywhere in the European Union” (Nielsen, 2019). With Covid-19 cases rising on the island, approximately 9,000 people moved from the burnt down Moria to a newly improvised tent camp in Kara Tepe, where living conditions are equally poor (ECRE, 2020). Despite the Council of Europe’s Commissioner for Human Rights call to urgently move asylum-seekers out of the camps on the Aegean islands (Council of Europe, 2019), the Greek government has insisted on its earlier plans, to eventually move asylum-seekers into close pre-removal detention centers (Fallon, 2020).

4.3 The new EU Pact and its implications on Greek law and policy

The above short chronicle of the extent to which Greece has absorbed EU norms on migration and of the way it has unilaterally responded to immediate asylum demands illustrates the following point: mere financial assistance, *ad hoc* relocation, and support from EU agencies in controlling borders have proved inadequate to ensure a EU migration policy that is ‘fair towards third country nationals’ (Art. 67 TFEU), and a truly common EU asylum system based on solidarity (Art. 78-80 TFEU).

In the following, the European Commission’s suggestions for CEAS reforms on procedures and detention are analysed. Does the EU Pact include measures designed to remedy the shortcomings of the CEAS as exemplified by the Greek case and to address the persisting challenges for solidarity and human rights?

4.3.1 Procedures

The proposal for a Regulation on external border screening combined with the new amendments to the 2016 proposal for an Asylum Procedure Regulation, appear to advance an intensification of the “hotspot approach” originally meant to facilitate the emergency relocation system. This means that Greece is no longer under the provisional obligation to accommodate hotspots for as long as it is under particular migratory pressure. Rather, it is required to introduce pre-entry procedures consisting of screening and mandatory RSD for certain categories of applicants at designated crossing points.

In practice, this does not alter much for Greece, but rather replicates the alarming situation currently witnessed on the Greek islands. Provisions covering asylum procedures at the borders, targeting particularly individuals who have transited through third countries, raise important questions in relation to access to asylum, discrimination, and availability of effective remedial mechanisms to protection seekers in countries located at the external borders.

4.3.2 Detention

The Pact envisages the possibility whereby screening procedures might require detention of the person in question, in which case the modalities of how this is to be applied, are left to domestic law. Given that individuals undergoing screening procedures are not presumed – according to the Pact – to have been authorized entry, detention of refugees who, in principle, do not fulfil entry conditions is legitimized. This administratively convenient – but highly questionable from an international law perspective, presumption of ‘irregularity’ is expected to affect the rights of the majority of asylum-seekers and refugees who reach the borders of the EU (see Malichudis et al., 2020).

Containment of asylum applicants at border zones is also made possible in cases where an application qualifies for an asylum border procedure instead of a regular procedure within the Member State's territory. Along the same lines, the right to prolong the screening and border procedures is recognized for states confronted with a ‘crisis’. Such an approach, allows room for excessive restrictions of movement, normalizing existing practices of detention *en masse* on the Greek islands and close to land borders.

4.3.3 Expulsions

As stressed in Chapter 1 of this book, the EU Pact blurs protection and return. This curtails procedural safeguards such as the issuance of separate asylum and return decisions as well as the automatic suspensive effect of appeals. Moreover, it allows for blanket application of third country rules to “any country where the person has transited departed or has other particular tie”. This is likely to reinforce recent Greek practice – conducted with the support of EU agencies such as the EASO – of summary returns to Turkey based on fixated decisions (see ECCHR, 2019). It might mean, for instance, that asylum applications by beneficiaries of temporary protection in a third country can be dismissed as inadmissible even if the country does not satisfy the existing criteria of a “safe third country”.

With regard to crisis management, the following remarks are due: first, the Pact proposal for a Regulation addressing situations of crisis permits Member States under pressure to introduce a number of derogations from the CEAS rules applicable in normal times. For example, access to territory and to asylum procedures may be denied for persons apprehended in direct connection with irregular border crossings. Also, Member States may invoke capacity constraints to limit access to asylum at border crossing points for irregular entrants. This seems to legitimize measures taken recently by the Greek government, such as the suspension of the right to lodge an asylum application followed by an immediate expulsion decision, or the initiation of criminal action against refugees who have irregularly entered the territory.

Member States faced with a ‘crisis’ situation may also derogate from regular asylum procedures and grant ‘immediate protection’ status to persons who risk being subject to indiscriminate violence in a situation of armed conflict upon return. Although this may temporarily prevent removals, relocation or responsibility transfers under the new Asylum and Migration Management Regulation will still be applicable and should be scrutinized. In terms of the content of protection, past experience has revealed states’ tendencies to use ‘temporary protection’ as a substitute to formal refugee status in order to deter arrivals.

Finally, ‘flexibility’ in the way states shall cope with crisis situations, promoted in the Pact, is highly questionable. It seems that wide discretion is left on national authorities which is why strong monitoring

mechanisms need to be established to ensure human rights compliance. For example, short time limits for lodging an application or an appeal may considerably restrict the procedural guarantees available to asylum-seekers subject to border procedures, increasing the likelihood of expulsion (Jones et al., 2020). This flexibility approach might very well be seen as the Commissioners' response to a demand by Greece, Cyprus and Bulgaria asking for 'an emergency and flexibility clause' to be integrated into the new Pact to 'reinforce the frontline states' capacity to effectively tackle exceptional migration circumstances' (Cyprus News Agency, 2020). Does this offset the maintenance and expansion of the first entry criterion in the new Asylum and Migration Management (*Dublin*) Regulation?

4.4 By way of conclusion

The provisions of the new EU Pact for the processing of asylum applications at the borders broaden the possibilities for declaring an application inadmissible or for rejecting it on the merits in the absence of proper individualized fair and effective procedures. Pre-screening procedures curtail procedural rights and guarantees enshrined in EU and Council of Europe law and may thus result in cases of *refoulement*, taking the form of mass expulsions and readmission.

The Greek case confirms that an approach to migration and asylum with a continued focus on borders and externalization is not sustainable. The fragility of safe third country arrangements was very well illustrated in February 2020 when the Turkish president deliberately ignored the EU-Turkey statement and let migrants and refugees reach the Greek border. Confinement in border regions has led to unnecessary human suffering contrary to international and European standards and has hindered confidence of local populations towards European and national institutions to maintain social cohesion. The continuation and normalization of such practices risk undermining the values and principles the CEAS is grounded on.

As pointed out by Beirens (2020), the EU Pact is a crash test for the fate of refugee protection in the region. Restoring mutual trust between EU states requires restoring faith to institutions. Attendance to national reception conditions and asylum procedures and addressing the fundamental inequalities permeating the European asylum system remain the main challenges for the years to come.

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5. 'I Wish There Was a Treaty We Could Sign'

"Leonard Cohen (2016)"

Thomas Spijkerboer

5.1 Introduction

Externalization is a core element of the Pact on Migration and Asylum proposed by the European Commission on 23 September 2020, and has been key to European policies since 1990. As 2015 has shown, even sustaining a limited number of asylum seekers and refugees when compared to more seriously affected parts of the world leads to an experienced crisis.

Consequently, the Pact focuses on preventing irregular migration, and seeking asylum is considered as a subset of irregular migration. In addition to proposing reforms of the Common European Asylum System (CEAS) aiming at making it more stress resistant, the Pact extensively repeats the idea that measures in third countries will prevent refugees and migrants from reaching external borders.

The main concepts in this discourse are root causes (especially for forced migration); return and readmission; and legal pathways. The Pact uses the language of partnership and multilateralism, including funding instruments, to achieve externalisation. While the Commission acknowledges that the EU and third countries have different interests, it states that comprehensive, balanced and tailor-made partnerships can deliver mutual benefits (European Commission, 2020: 17). While this could be read as a truly multilateral approach, other passages in the Commis-

sion proposals show that the Commission, as before, proposes to use its assumed superior position of political and economic power – so-called issue linkage and conditionality (also known as carrots and sticks).

This essentially coercive approach to cooperation (focussing on the question of how the EU can make other countries do what is in the EU's interest) ignores the reality that the EU and many third countries have conflicting interests and normative perspectives when it comes to migration and mobility. This Chapter addresses that assumption.

The regulation of international migration and mobility is fundamentally unequal. While there are free movement zones on the global South as well as in the global North (Czaika et al., 2018), the legal regime between global North and South facilitates the mobility of citizens from the global North while subjecting that of citizens from the global South to severe restrictions (Mau et al. 2015).

This inequality is evident from a visualization of the Passport Index (Figure 1 below), showing in white the nationalities which need an entry visa for less than 100 countries, and in black those needing a visa for more than 100 countries (Spijkerboer, 2018). The introduction of carrier sanctions means that visa requirements are enforced within the black countries on the map.

Figure 1 Youssef Al Tamimi on the basis of Passport Index (2017/2021)



5.2 Diverging interests

This global inequality resulting from the visa policies of the global North is a difficult starting point for cooperation between, on the one hand, Europe, and Africa and Asia on the other. African and Asian countries perceive European external migration policies as an enterprise to maintain and reinforce European privilege at the expense of their citizens. The language of partnership and multilateralism used by the EU sits uneasily with the EU having imposed total control over mobility of people from the black countries on the map towards the EU to begin with. This outlook does not seem any more promising when we look at the three pillars of external migration policy which the Pact repeats: root causes, returns and readmission and legal pathways.

5.2.1 Root causes

Root causes is a concept which was originally develop in relation to refugees and forced migration. The core idea is that refugees and forced migrants are best assisted by addressing those phenomena that caused their flight to begin with. Consonant with earlier developments linking refugees and irregular migration, the Pact refers to “root causes of irregular migration”. Like before, the notion of root causes is related primarily to economic development, even though the Commission refers to the importance of conflict prevention and peace (European Commission, 2020: 20).

As B.S. Chimni (2019) has pointed out: it is remarkable that Europe as well as other actors in the global North remain silent about the root cause that is arguably the largest single contribution to forced migration, namely military interventions and proxy wars of the US and EU countries such as those in Afghanistan, Iraq, Syria, Yemen, Libya and the subsequent destabilisation of the Sahel. Also, economic development initially results in more migration, while in addition development policies have notoriously little effect, partly because substantial amounts end up being paid to European entities.

5.2.2 Return and readmission

For decades, European countries have argued that effective return is essential to their migration policies. The idea is that, if irregular migrants know that they will be deported from Europe, they will realise it makes no sense to undertake the trip and won't come to begin with.

However, many citizens in countries of origin voice protests against their governments cooperating with Europe in returning their friends and relatives (as happened in Mali and Senegal, for example). Although it is regular, and not irregular, migrants that send the most remittances, the solidarity of citizens within countries of origin with their friends and relatives abroad is an obstacle to cooperation. This is more so in countries of origin with functioning electoral systems or with forms of free media and civil society.

One of the innovations the Commission proposes in the Pact is to codify the possibility to take "any measures" which could be taken against a country that "is not cooperating sufficiently on the readmission of illegally staying third-country nationals" (European Commission, 2020: Article 7). A detail to note is that steps can be taken against countries even if they refuse to readmit non-nationals who transited through their territory, as is evident from the term 'third-country nationals' instead of 'their nationals'.

5.2.3 Legal pathways

Directly linked to negotiations on readmission, the EU has said over the past 15 years that it is open to discussing legal pathways for migration (e.g. European Commission, 2007). The two are to be incorporated into Mobility Partnerships and Common Agendas between the EU and third countries.

However, in reality it turns out that these instruments promote the externalisation of EU migration policy (Broczka and Paulhart, 2015). Legal pathways fail to become a reality. The most blatant example of this was the implementation of the EU-Turkey deal of March 2016. While Turkey by and large abided by its obligations to prevent the movement of refugees towards Europe, talks of visa-free travel to Europe for Turkish nationals predictably got stuck in a way that, from the Turkish perspec-

tive, was a matter of European obstruction. In the Pact, passages on legal migration mention extremely limited resettlement of refugees and high skilled migration, and in addition remain nebulous and unspecific. Legal migration as an alternative to irregular migration is not part of the discussion.

Of the three main pillars of European external migration policy, the interests of the EU and of third countries do not run parallel. An important element of EU policy is to try to influence the interests of third countries through issue linkage and conditionality: the EU will finance things in third countries, give other advantages, or to the contrary take punitive measures (including limiting the issuance of visas, or removing a country from the list of visa-free countries; European Commission, 2020: 21-22), depending on whether the third country implements European external migration policies. This sometimes works, but comes at a price: that of supporting problematic regimes.

In order to implement European external migration policies, third country governments need to repress domestic opposition to those policies. And if the EU has brokered a migration agreement with the government of a third country, it has an interest in preventing regime change even if it is democratic, if the new government risks being more critical of European migration policy. Supporting problematic regimes is not merely an ethical issue. It also undermines a basic assumption of European external migration policies: the idea that open and democratic societies in third countries will be attractive to their citizenry and will lead to less irregular migration.

5.3 Different normative perspectives

As we saw above, third country interests do not necessarily align with European interests in the field of migration policy. Partly in relation to this, third countries may have different normative ideas about migration and international law. By way of example, I will focus here on Africa, which is a major target area of European policy.

5.3.1 Non-reversal

Expressing the doctrine on which European state practice, legal doctrine, academic writing and case law is based, the European Court of Human Rights consistently begins its reasoning in migration-related judgments by promulgating that “as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory”.¹

This construction of international law prioritises the right of states to control migration over human rights, which has been labelled a “sedentarist” position by Daniel Thym (2015), and the “Strasbourg reversal” by Marie-Benedicte Dembour (2017).

Case law of the African Commission of Human and Peoples’ Rights makes clear that African courts have not necessarily adopted the sedentarist legal doctrine of the European Court of Human Rights. The Commission labels mass deportations as a violation not only of the prohibition of collective expulsion, but also of the right to property, to work, to education, to family life as well as to an effective remedy, and as discrimination based on origin. Only after establishing this, it remarks that the Commission does not call into question the right of states to take legal action against illegal immigrants (African Commission of Human and Peoples’ Rights, 1997a; 1997b). Similarly, the Kenyan High Court prohibited the refoulement of Somalians and in doing so constructed international law as well as the Kenyan Constitution broadly. It refers to the number of refugees in Kenya to underline the importance of these norms, instead of justifying a restrictive interpretation (High Court of Kenya, 2017).

This non-inverted way of relating international law and migration can also be seen in the work of African academics such as Abdoulaye Hamadou (2018) and Edwin Odhiambo-Abyua (2006). Furthermore, core concepts in international migration law (such as irregular migration and transit migration, and the concrete meaning given to migrant smuggling) are seen as an effect of the exclusion of migrants from human rights protection imposed on African policy makers by European pressure. In

1 See the foundational judgments on Article 8 ECHR (family reunion), European Court of Human Rights 1985, at 67; on Article 3 ECHR (asylum), European Court of Human Rights 1991, at 102; and on Article 5 ECHR (immigration detention), European Court of Human Rights 2008, at 64.

their writing, many African authors do not distinguish strictly between migration and mobility; they normalise mobility/migration; and see free movement legislation as a codification of pre-existing fundamental norms and practices characteristic of pre-colonial normality. African social scientists relate this to the specific character of African states and state borders, as well as to a tradition of mobility on the continent (see among Abebe, 2017; Adepoju, 2002; Dicko, 2018; El Qadim, 2018).

In sum, there exists a distinctly African normative framework that includes international legal norms, which sees migration control as requiring justification, whereas the European normative perspective *a priori* assumes its legitimacy as being inherent in state sovereignty. It would be simplistic to claim that all African actors that are to play a role in European external migration policy have the mobility-oriented normative framework in mind that has been highlighted here. Many African state actors relish the control tools that European external migration policy provides (and funds). Nonetheless, this normative framework exists, and may be shared by African interlocutors of European policy makers. In any case it constitutes a reality in civil society and domestic politics of many African countries.

5.3.2 Sovereignty

The European perspective views the right to control migration as inherent in state sovereignty, and find it obvious that other states are obliged to respect that sovereignty. Such respect may imply that third states prevent migration through their territory towards Europe. African states are also quite concerned with their sovereignty, but in ways that may be at cross purposes with European concerns. A first form of this is the objection that, if an African state is to cooperate with European external migration policies, it is being instrumentalised by Europe. This has been argued to be an infringement of state sovereignty in the Libyan litigation about the Memorandum of Understanding with Italy (Achour and Spijkerboer, 2020). Similar concerns have been raised by Hamadou (2018) and Dicko (2018) in relation to Niger and Mali respectively.

A second form which the concern with sovereignty can take is related to return and readmission. In cases where the nationality of an individual is unclear (as may happen in Africa, with its arbitrary borders and incomplete civil registration), European states often assert that a

person is Moroccan or Ethiopian. However, establishing nationality is the prerogative of the state acknowledging its nationality. Another state asserting that a particular person has the nationality of a state that denies this is the case does not sit easily with state sovereignty.

The same is true for the relation between a state and its nationals. There is an evident right of a national to return to their own state. The international law foundation for an obligation of a state to readmit a national while both the national and their state do not wish so is weak. African states may find that it is to that state, and not to a European state, to decide how it will shape its relations with its nationals abroad. Additionally, African states may consider the idea that they are under an obligation to admit non-nationals who purportedly transited through their territory as an affront to their sovereignty.

5.4 A treaty to sign?

To a considerable extent, the European Commission's Migration and Asylum Pact relies on the success of its external migration policies, which can be summarised as third countries keeping migrants away from European borders. This requires cooperation of third countries.

However, third countries feel the starting position is unfair because of the unequal global mobility regime. European and third countries have diverging interests and normative outlooks. So far, EU policy has tried to bridge the gap of interests and norms by externalising its political economic power, by informal arrangements, and increasingly by financial instruments (which are then informalised on top of that, see Spijkerboer and Steyger, 2019). These arrangements are seen by many in the targeted countries as being mildly or less mildly coercive, and as disrespectful of African interests and perspectives.

Much is to be said for reconsidering the option of the classical international law instrument that was developed for bridging the divergent interests and positions of states: the treaty. Treaty making allows for involving parliaments and civil society, which may help in including multiple interests and perspectives in the outcome. In the mid-long term, the EU has an interest in cooperation with third countries that is considered as legitimate and beneficial by the populations of all countries involved.

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6. Community Sponsorship, The Pact and The Compact: Towards Protection Principles

Nikolas Feith Tan

6.1 Introduction

Community sponsorship is a current darling of the international protection regime as a potential solution to the dismal global refugee situation. Following almost 40 years of operating essentially in isolation in Canada, Germany, Ireland, Italy, Spain and the United Kingdom have piloted or established community sponsorship models since 2015. At the first Global Refugee Forum held in December 2019, Brazil, Belgium, Malta and Portugal pledged to explore pilot community sponsorship models (UNHCR, 2020).

Beyond this quite remarkable recent uptake of community sponsorship, there is significant buzz around the concept at both UN and EU level. As explored below, community sponsorship has no settled definition, but inherent to the model is shared responsibility between civil society and the state for the admission and/or integration of refugees (Tan, 2021).

This Chapter first seeks to define the ‘umbrella’ concept of community sponsorship, before outlining the role of community sponsorship in the UN Global Compact on Refugees (GCR) and the New Asylum and Migration Pact, respectively. Finally, I suggest that a number of principles to maintain the protective promise of the community sponsorship as a solution for refugees.

6.2. Defining community sponsorship

Community sponsorship has recently been described by UNHCR (2019a) as “programmes where individuals or groups of individuals come together to provide financial, emotional and practical support toward reception and integration’ of refugees”. Indeed, community sponsorship has been ‘rather ill-defined’ and is best understood as an umbrella term encompassing several different modalities (European Commission, 2018).

Three strains of community sponsorship are currently operating. First, community sponsorship has historically involved privately-led *admission and integration* of refugees via an autonomous *complementary pathway*. The original Canadian approach of private refugee sponsorship matches this model. Such programmes are firmly separated from state-run resettlement as an “initiative by private associations with recognized expertise in the field to provide for an alternative, legal, and safe pathway” (Ricci, 2020).

In its original form in Canada, community sponsorship involved the ‘naming’ of individual refugees by sponsors and the creation of a pathway independent of other channels to admission (UNHCR, 2019a). More recently, the Humanitarian Corridors model pioneered in Italy is a good example of community sponsorship as complementary pathway.¹

Second, more recently community sponsorship has emerged as a *sponsored resettlement*, focused solely on *integration* support for resettled refugees matched with civil society sponsors. Rather than creating a pathway to admission, community sponsorship involves integration assistance for resettled refugees. This model of community sponsorship uses existing UNHCR and state resettlement channels (including selection, referral, health checks etc.) to admit refugees. Civil society involvement is largely limited to the provision of support after arrival and focused on the successful integration of refugees. Moreover, community sponsorship as resettlement generally benefits UNHCR-referred refugees, rather than ‘named’ individuals, although practice varies between jurisdictions.²

1 For more on the Humanitarian Corridors model, see: <https://www.humanitariancorridor.org/en/homepage/>.

2 New Zealand’s community sponsorship pilot, for example, accepted both civil society nominations and UNHCR referrals, though all sponsored refugees had to be recognised by UNHCR.

Community sponsorship as a resettlement is reflected in community sponsorship schemes in Ireland and the United Kingdom squarely focused on the support of resettled refugees, beginning within the state resettlement quota with the intention of becoming additional over time.³ Similarly, the recent German Neustart im Team (NesT) programme is a clear example of community sponsorship as a resettlement tool.⁴

Finally, the most recent – and surely broadest – conception of community sponsorship is as a ‘wrap-around’ tool for both resettlement and any given complementary pathway “capable of supporting refugees referred by UNHCR... as well as refugee students, workers and family members arriving through other pathways” (Bond et al., 2020). This definition does not focus on the pathway or legal status of refugees sponsored, but rather on civic engagement embracing refugees.

While open or even competing definitions of community sponsorship provide significant flexibility, it leaves the concept vague and even open to co-option.

6.3 Community sponsorship in the Compact

The adoption of the GCR as a global responsibility sharing effort comes against a backdrop of the “deterrence paradigm” in traditional asylum countries, in which a broad array of measures prevent asylum seekers accessing the territory or asylum procedures of destination states (Gammeltoft-Hansen and Tan, 2017). Over the past thirty years, lack of legal access to asylum for refugees has emerged as “perhaps the single most prominent topic in refugee studies” (Costello, 2019), with some authors even predicting the end of the right to seek asylum in the Global North (Ghezelbash, 2018).

Community sponsorship is closely linked to one of the four GCR objectives focused on the expansion of third country solutions through

3 For more on the community sponsorship program, see: <https://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/Misc/CS-UK-IRiS-June-2019.pdf>.

4 For more on Neustart im Team (NesT), see: <https://resettlement.de/en/current-admissions/>.

“resettlement and complementary pathways”.⁵ More broadly, community sponsorship is aligned to the GCR as an example of a whole-of-society approach to refugee protection (UNHCR, 2019b).

Against this backdrop, the GCR’s focus on the expansion of third country solutions suggests that resettlement and complementary pathways should be the primary way to receive international protection in the Global North. Indeed, such controlled pathways are often the preferred modes of protection in destination countries, rather than spontaneous asylum (Hashimoto, 2018). Thus, in 2016 the European Commission stated that “resettlement should be the preferred avenue to international protection in the territory of the Member States” (2016).

6.4 Community sponsorship in the Pact on Migration and Asylum

As noted in Chapter 1 of this book, the Pact draws on the GCR in its Recommendation on legal pathways (European Commission, 2020), which refers to the recent Global Refugee Forum and UNHCR’s strategy to scale up resettlement and complementary pathways (UNHCR, 2019).

Community sponsorship plays a modest but potentially important role in the new Pact. As a part of legal migration efforts, the European Commission points out the commitment to support national community sponsorship schemes “through funding, capacity building and knowledge-sharing, in cooperation with civil society, with the aim of developing a European model of community sponsorship”.

The promise of technical assistance from the EU to Member States is not new. Indeed, the Commission released a hefty report on the feasibility of community sponsorship in the EU in 2018⁶ and a recent Asylum, Migration and Integration Fund (AMIF) Action Grant funded projects launching new or developing existing community sponsorship schemes.⁷

5 GCR paras 7 and 95. Complementary pathways identified in the Compact are family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees.

6 The full report is accessible here: <https://op.europa.eu/en/publication-detail/-/publication/1dbb0873-d349-11e8-9424-01aa75ed71a1>.

7 For more on the Asylum, Migration and Integration Fund (AMIF) community sponsorship grant, see: <https://ec.europa.eu/migrant-integration/news/amif-2019-funding-call-integration-through-private-sponsorship-schemes>.

The European Asylum Support Office (EASO) has already been involved in a pilot project promoting community sponsorship in interested EU members states (EASO, 2018).

Nevertheless, the concept of a ‘European model’ of community sponsorship is novel, and supported by Commission Recommendation to the same effect (European Commission, 2020). While implementation of community sponsorship remains firmly in the policy – and not legal – realm, the call for a European approach to sponsorship points to a sense of ownership and uptake that moves beyond Canada (Tan, 2021).

6.5 Toward protection principles

The proliferation of new community sponsorship models since 2015 bring both risks and opportunities. On the one hand, the rapid growth of community sponsorship means policymakers may quickly be informed of the various models implemented in multiple jurisdictions. On the other hand, the inherent flexibility of the concept may leave it open to co-option where, for example, governments use community sponsorship to replace resettlement, or discriminate by protecting only particular religious groups. To mitigate these risks, priority needs to be given to the following *six protective standards* drawn from refugee and human rights law and lessons from recent practice:

First, respecting the right to seek asylum

The introduction and expansion of community sponsorship models should not be used by national governments to justify deterrence. In other words, community sponsorship should not be instrumentalised to distract from deterrence policies. While state resettlement has long been used strategically in this way (van Selm, 2004), there is little evidence that the strategic use of resettlement has actually driven down spontaneous asylum (Durable Solutions Platform, 2020). Given its community-driven nature, community sponsorship should be somewhat insulated from government interests in this regard.

Second, additionality

Additionality should remain at the forefront of discussions on community sponsorship, to avoid the effective outsourcing of government responsibilities. Of course, community sponsorship should not replace resettlement (Hirsch et al., 2019).

However, the question of additionality is becoming increasingly complex. While ideally community sponsorship schemes should be additional to existing resettlement programmes *from the outset*, pragmatic considerations may require that initial community sponsorship models take place within existing resettlement quotas. In such cases, a shift to additionality in the short to medium-term must remain a focus – an approach that may be termed ‘additionality in principle’.

Moreover, some government may seek to ‘reverse engineer’ additionality when negotiating the state quota in relation to community sponsorship. Finally, the establishment of community sponsorship schemes in states with no existing resettlement programme raises further complex questions of pragmatic or realistic approaches.

Third, non-discrimination and equal treatment

The principle of non-discrimination flowing from international human rights and refugee law should guide state practice on community sponsorship.⁸ As UNHCR (2019a) notes, community sponsorship should be “non-discriminatory and not distinguish on the basis of nationality, race, gender, religious belief, class or political opinion”.

Learning from previous practice in Eastern Europe, future community sponsorship models should avoid discrimination in the selection of refugees for sponsorship. Moreover, principles of equal treatment require that sponsored refugees not be treated differentially from government-resettled refugees during integration, and *vice versa*. In particular, in the case of relationship breakdown, the principle of equal treatment requires that the state step in to protect the rights of a sponsored refugee. Encouragingly, the Pact and the above-mentioned Commission’s Recommendation on legal pathways calls for “transparent and non-discrimina-

8 For the full text of the 1951 Convention relating to the Status of Refugees, see: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>.

tory selection criteria” when designing community sponsorship schemes (European Commission, 2020).

Member States and their partners should define for those in need of international protection. From the start of the programme, they should ensure that the respective roles and responsibilities of civil society and government are clearly defined in the pre-departure and post-arrival phase. Member States remain responsible for the security checks and admission procedures and need to guarantee that appropriate safeguards and safety nets are in place.

Fourth, protection-focused

Notwithstanding its flexibility community sponsorship should remain firmly focused on refugee protection. This means, for example, learning the lessons from Australia’s Community Support Programme, which is as much centred on labour market integration as refugee protection. Equally, the use of community sponsorship to facilitate family reunification should neither replace the state’s family reunification obligations, nor place unreasonable burdens on sponsors.⁹

Fifth, clarity of legal status

Community sponsorship approaches must provide a clear legal status to sponsored refugees. In general, refugees admitted under a community sponsorship scheme should be entitled to the full set of rights afforded other refugees in the country, in line with the principle of non-discrimination and socio-economic rights set out in the 1951 UN Refugee Convention (Articles 2-34). Community sponsorship as resettlement carries the additional status of providing a durable solution, thus often amounting to permanent residence more rapidly than community sponsorship as complementary pathway.

Sixth, transparency and accountability

Finally, community sponsorship approaches should be supported by a robust policy framework. In particular, any model involving a ‘naming’ element should include safeguards to ensure the integrity of the selection

9 For more on family reunification, see: <https://www.unhcr.org/5a8c40ba1.pdf>.

process and, at a minimum, a requirement that the named individual meet the definition of refugee contained in Article 1A(2) of the 1951 UN Refugee Convention. Ultimate responsibility for refugees must clearly remain with the state, not private actors, as reflected in the Commission's Recommendation on legal pathways (European Commission, 2020).

Conclusions

In the coming years, we are likely to see the emergence of new community sponsorship models that challenge the protective core of the concept. This Chapter has started the work of setting out principles of general application to help ensure that the rise of an EU approach to community sponsorship – as outlined in the Pact on Migration and Asylum – does not dilute its promise of providing protection for refugees and people seeking international protection.

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7. Internal Solidarity, External Migration Management: The EU Pact and Migration Policy Towards Jordan

Lewis Turner

7.1 Introduction

What will the EU's New Pact on Migration and Asylum offer asylum seekers and refugees living outside of the Union? The answer, it would seem, is 'very little'. The Pact discusses the need for dialogue, cooperation and mutual partnerships with relevant third countries. Yet it focuses on solidarity among EU Member States, which comes at the expense of meaningful solidarity with asylum seekers and refugees inside, outside, and at the borders of the EU (see European Commission, 2020).

This Chapter argues that, at a time of unprecedented health and economic crises, a new EU Pact should represent an opportunity to break from the restrictive and destructive agendas that have long framed European migration policy. Drawing on the situation in Jordan – one of the EU's key migration partner countries – the Chapter examines how efforts to support refugees' livelihoods where they currently live have been a key element of the EU's externalisation agenda. It explores the successes and failures of these policies, and then the consequences of the Covid-19 pandemic for livelihoods policies and programmes. It argues that the events of 2020, which have threatened many refugees' (already deeply precarious) livelihoods, demonstrate that – now more than ever – a new approach is needed.

7.2 A Pact framed by ‘crisis’

The Pact is full of worrying signs from the perspective of asylum seekers’ and refugees’ rights. It discusses (see European Commission, 2020: 4, 14, 10) the need for a “swift return procedure” and “reinforced external borders”, and it plans to “build on the hotspot approach”, which has led to “fundamental rights challenges” where it has been implemented (Danish Refugee Council, 2017:4). On all of these counts (and many more) the EU ignores the very migration research it funds (Kalir and Cantat, 2020).

Beyond any individual policy, however, what is striking about the Pact is the worldview it propagates. It is framed by discussions of crises (past, present and future). The EU appears to see migration ‘crises’, or migratory ‘pressure’ that could lead to another ‘crisis’, around every corner. In particular, the so-called migration crisis of 2015-2016 looms large over the new policy arrangements. It clearly and explicitly shapes the background thinking to the Pact, which aims to reinforce Fortress Europe against similar numbers of people arriving ‘irregularly’ in the future.

In assessing the new Pact, which aims to place migration even more centrally in EU external relations, it is important to consider the range of ways that the EU responded to this ‘crisis.’ A key piece in the jigsaw through which the EU has attempted to stop asylum seekers and refugees from reaching its borders is providing incentives for people to stay where they are. The ‘solidarity’ that the Pact demands for EU members is just one side of the coin; internal solidarity shares space on the same coin with Europe’s external migration management (see Bisong, 2019).

7.3 Livelihoods and the externalization agenda

In the wake of the ‘migration crisis,’ the EU and other partners decided that focusing on jobs and livelihoods was one way to reduce the number of asylum seekers and refugees attempting to enter the Union. If people can work where they are, they reasoned, they’ll have fewer reasons to come to Europe. This is still central to the EU’s thinking. As the Pact states, “economic opportunity, particularly for young people, is often the best way to reduce the pressure for irregular migration” (European Commission, 2020: 18)

Leaving aside the accuracy - or otherwise (see Crawley, 2017) - of the logic underpinning this idea, asylum seekers and refugees should of

course have the right to work where they live. They should have opportunities to access *decent* work, which means work that offers (among other things) a fair income, security and safety in the workplace, and equality of opportunity (see International Labour Organization, n.d.).

In the period during the ‘migration crisis,’ Jordan was at the centre of these policy proposals. In February 2016, at the end of the London Donors Conference for Syria and the Region, co-hosted by Germany, Kuwait, Norway, the United Kingdom and the United Nations, a document entitled ‘The Jordan Compact’ was released (Government of Jordan, 2016). In it, the Government of Jordan declared that in the coming years it would potentially allow as many as 200,000 Syrians to obtain work permits in Jordan. It claimed to represent a “new paradigm” for refugee responses, by bringing together development and humanitarian approaches.

The EU’s role in this Compact was central. It has been one of the main donors supporting the implementation of the Compact, and it agreed to renegotiate its ‘Rules of Origin’ arrangements with Jordan, in an attempt to make it easier for Jordanian companies to export to the EU (Lenner and Turner, 2019). All of the annual follow-up conferences on ‘Supporting the Future of Syria and the Region’ have been held in Brussels, with the 2018, 2019, and 2020 events co-chaired by the EU and the UN.

The success of the compact has been a subject of debate among observers. As I have explored elsewhere together with Katharina Lenner (Lenner and Turner, 2018), the Compact encountered numerous challenges because it failed to take into account the views of key stakeholders - most glaringly, those of Syrians themselves. This resulted in a focus on work in sectors where very few Syrians wanted to work.

Because the release of donor funds was tied to the number of work permits that were being issued, the underlying goal of *decent* work for Syrians appeared to fade into the background. Having a work permit does not necessarily equate to having a job, let alone a decent job, but work permits appeared to become a goal in themselves. As the Jordan International NGO Forum and Jonaf argued (2020: 2), work permits “have done little to strengthen decent work protections”.

Nevertheless, it is important to acknowledge what has been achieved through the Jordan Compact, and the many schemes, reforms, and projects that have spun off from it in the past five years. Indeed, the

Jordan Compact is notable for the extent to which it has actually been implemented, in contrast to the EU's deals in other contexts, for example Lebanon (Fakhoury, 2019). From January 2016 to August 2020, slightly over 200,000 work permits were issued to Syrians in Jordan (UNHCR, 2020a). Syrian unemployment has dropped radically, although to a greater degree among men than among women (Tiltne et al., 2019).

It is important to note, however, that these cumulative work permit figures do not tell us how many Syrians hold a *currently valid* work permit (most permits are valid for one year), or how many permits have been given to the same people in different time periods. The figure for how many permits are valid at any one time is harder to come by than the cumulative total, but, for example, was quoted as around 45,000 in mid-2019 (Gordon, 2019).

Furthermore, while many Syrians were already working without permits in Jordan, many report that having a permit makes them feel more secure in their legal status in Jordan, and less under threat of deportation to Syria (International Labour Organization, 2017), which has been a widespread practice (Human Rights Watch, 2017). Even with this more secure legal status, however, "access to decent, well-paid employment that gives a feeling of job security is still a distant hope" for most Syrians in Jordan (Tiltne et al., 2019:135).

In an interesting recent research paper, Peter Seeberg (2020) explores, through interviews with Jordanian officials, how EU-Jordanian relations are seen by actors within the Jordanian government. A running theme of the analysis is that, while the EU is the largest donor to Jordan concerning Syrian refugees and its largest trading partner, the money donated (by the EU and overall) falls *very* far short of the funds required. In 2020, for example, according to the Ministry of Planning and International Cooperation, the Jordan Response Plan received \$781 million in funding, representing only 34.7 percent of the amount required (Jordan Times, 2021). The EU does not sufficiently recognise or take into account, Jordanian officials argue, the Jordanian context or the range of challenges that the country is facing. The EU's negotiating demands, therefore, are often inflexible, and its approach can be counterproductive (Seeberg, 2020).

Meanwhile, even after it was further revised in 2018 to attempt to make it more accessible to Jordanian businesses, the much-hailed renegotiated 'Rules of Origin' deal between the EU and Jordan appears to

have achieved relatively little (Al Nawas, 2019). This is especially the case in terms of the number of jobs created and the number of firms exporting under the deal.

Its positive effects notwithstanding, it is clear that the Compact has not brought about the 'paradigm shift' its supporters envisaged. While many of those involved in promoting the Jordan Compact hoped that it would be the first of many such compacts to provide jobs for refugees living in the 'Global South,' this has not proved to be the case. To date, arguably the only substantively similar 'jobs compact' that has been signed is in Ethiopia. Implementation of this agreement has been slow - much slower than in Jordan - and wages at the factories where refugees were expected to work fell well below refugees' expectations (Gordon, 2019).

7.4 Refugee livelihoods and Covid-19 in Jordan

While new EU arrangements on migration and asylum have long been discussed, we cannot ignore the fact that the Pact is coming at a time of a pandemic that has devastated so many lives and livelihoods across the world. These recent developments make the EU's approach to migration even more regrettable, and its strategies to achieve its restrictive goals even less realistic.

The situation for refugee livelihoods in Jordan, for example, has considerably worsened since the beginning of the pandemic. Enacting one of the world's strictest lockdowns in March 2020, Jordan initially managed to keep the numbers of Covid-19 very low. A large proportion of the cases that were recorded in Jordan were at its border crossings, or in quarantine facilities (Ministry of Health, 2021). Yet from August 2020 onwards, case numbers in Jordan increased significantly. In early September 2020, the first known cases of Covid-19 were recorded in Syrian refugee camps in Jordan, and by the end of January 2021, there had been over 1,200 cases in Za'tari Refugee Camp, which has a population of approximately 80,000 (UNHCR, 2021).

Jordan's policies, while initially successful in keeping the number of cases very low, came at a cost. Not only to the Jordanian government, whose 2021 budget was described by Finance Minister Mohamad Al-Ississ as "the most difficult for Jordan ever" (Omari, 2021). Not only to the Jordanian economy overall, which contracted by approximately 3% in

2020, representing the first year of negative growth in 30 years (Al-Khalidi, 2021). But the consequences of this economic decline, in Jordan as across the world, have fallen most heavily on the shoulders of the most marginalized sectors of the population, including asylum seekers and refugees, and the impacts have also been highly gendered (UN Women, 2020).

As Reva Dhingra (2020) has detailed, most refugees in Jordan do not primarily rely on international assistance for their income. They gain their principal income from working in sectors that could not switch to remote working, such as agriculture, construction and retail. Syrians living in camps faced rising prices in the shops when the lockdown commenced in March, and the government has subjected the camp to “stringent movement controls” (UNHCR, 2020b:2). Much of the work offered by international organizations (through schemes such as ‘incentive-based volunteering’) was also suspended, as many programmes were temporarily shut down due to the lockdown.

According to UNICEF, the number of Syrian and Jordanian households with a monthly income of less than 100 Jordanian dinars (around \$140) had doubled by August, compared to prior to the pandemic (UNICEF, 2020). The rate of unemployment in Jordan reached 23.9% (21.2% among men and 33.6% among women) in the third quarter of 2020, up almost five percentage points compared to the year before (Jordan Times, 2020). The goal of refugee ‘self-reliance’, which is set to continue to be central to the EU’s external refugee policies, has long been critiqued (Easton-Calabria and Omata, 2018). But Covid-19 should prompt a thorough re-evaluation of this goal’s plausibility, and indeed its desirability (see Herson, 2012).

Beyond these consequences, the Covid-19 pandemic has placed a huge burden on already overstretched humanitarian and governmental budgets. Even before the pandemic, the funding for the Syria response fell well short of what was needed (Ministry of Planning and International Cooperation, 2020: 1). Compounding these problems, a report from the Durable Solutions Platform expressed the fear that “if donors redirect their funding away from livelihoods” to focus on Covid-19, there may be “further reductions in livelihoods interventions and funding in the medium-term” (Durable Solutions Platform, 2020).

7.5 Conclusion

In this context, will the European Union be willing to contemplate increasing its financial contributions to (even close to) the necessary levels? Will refugees living in the EU's so-called migration partner countries ever be high enough on its priority list to generate the kind of support that is necessary?

The signs are not encouraging. The EU's attempts to rejuvenate solidarity among its Member States through the new Pact are simultaneously an entrenchment of the demonstrable lack of solidarity it has shown with asylum seekers and refugees within, on, and outside its borders. In the context of twin health and economic crises across the globe, a new approach must be adopted. For once, solidarity with asylum seekers and refugees must be the priority.

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8. The Spanish Borders on The Cusp of The New European Pact on Migration And Asylum¹

Iker Barbero and Ana López-Sala

8.1 Hard times for asylum in Europe

On February 13, 2020, the European Court of Human Rights made public its ruling on the case of N.D. and N.T. against Spain, by which it resolved the appeal against the previous ruling of October 3, 2017, of the same court. In contrast to the ruling handed down at first instance, among other relevant issues (such as the fact that, in view of the undefined concept of “operational border” (López-Sala, 2020)), the border fence must already be considered Spanish territory and therefore subject to the jurisdiction of the ECHR, the Grand Chamber ruled in favour of Spain, that Article 4 of the Protocol to the Convention is not applicable to this case (two African boys who were intercepted trying to jump the border fence in Melilla and were immediately returned to Morocco without any procedure for expulsion, much less the option of applying for asylum) since it was the applicants themselves who placed themselves in an illegal situation by not using the means of access established by law, such as applying for asylum at an embassy or border post.

This ruling represents a regression in the defence of basic rights by conditioning recognition of those rights of situations involving merely administrative (non-criminal) conduct. It also reveals a paradigmatic

¹ This text is the result of the work carried out within the UPV-EHU Research Project entitled *TRANSITEUS: The reception of migrants in transit in the Basque Country/Euskadi: diagnosis and proposals from a guarantee perspective* (US19/08) (www.transiteus.eus).

shift in Spanish and European approaches to border control and the fundamental rights of migrants and refugees.

Spain, like other countries on the southern border of Europe, has been practicing this type of summary expulsion² for years, in full knowledge that Morocco is a country where the violation of the rights of migrants is manifestly systematic. In addition, the fact remains that certain people cannot materially obtain protection in a consular delegation because Spain has not wanted to by-law develop the process.³ Even worse, many report being prevented by Moroccan police from accessing the international protection application offices in Ceuta and Melilla for no other explainable reason than their origin or skin colour. Forced to jump a deadly border fence or venture out on a dangerous sea crossing, these acts of desperations are the result of the consolidation of a specific model of border control and outsourcing policies. These policies are in line with what has been called “a contained mobility approach” (Carrera and Cortinovis, 2019), in which an erosion of legal guarantees and the protection of migrants and refugees can be observed.

Migration and Asylum policies in Europe are currently at a crossroads. How they will be developed will largely be determined by the contents of the New Pact on Migration and Asylum.⁴ The content of the New Pact reveals some of its fundamental principles:

Firstly, there is an emphasis on external borders as physical and procedural processing areas (including rapid identification and registration) where deportable irregular immigrants would be distinguished from refugees.

Secondly, there is a clear commitment to promote “effective” and

2 Spanish police regularly implement a “push-back” approach to expel migrants from Spanish territory (often referred to as *devoluciones en caliente* in Spanish). This consists of immediately turning over people who have been intercepted trying to jump external border fences to the Moroccan police or simply abandoning them on Moroccan soil. Because the expulsion is immediate, the migrants have no possibility of applying for protection or claiming any vulnerable situation, such as being a minor or a victim of trafficking. Since 2015, these practices have been regulated by Spain’s Public Safety Law, pending the resolution of the Spanish Constitutional Court on the constitutionality of these practices.

3 Currently, only the modalities of family extension and reunification are possible (Art. 38 Asylum Law), which represents 0.67% of the applications according to data provided by the OAR (Spanish Refugee Office).

4 See https://ec.europa.eu/info/publications/migration-and-asylum-package_en. See Chapter 1 of this Book by S. Carrera.

“rapid” mechanisms at the border for the containment, identification and return of migrants classified as irregular or those whose applications for protection are rejected.

Thirdly (and linked to the previous one), there will be a focus on strengthening the agreements with third countries through extended and broad-ranging partnerships that incorporate readmission and return procedures.

These guidelines suggest that the “borderization” of asylum in the EU, along with the widening of externalization, will be the cornerstones of a policy whose objective of effective return will be a key element of future management. Content aside, most troubling perhaps is that the EU, or specifically some of its Member States, seem to be obsessed with controlling and immobilizing the “unauthorized secondary movements”. There is no doubt that this will guide the new European migration and asylum management in future times.

From this starting position, is it possible to articulate the objectives of the New Pact as safeguarding the fundamental rights and legal guarantees of migrants in need of protection? Based on an analysis of the most recent approaches to migration and asylum management in Spain – in which many of the proposals provided for in the Pact are being implemented – this Chapter examines whether contained mobility is already the operative paradigm.

8.2 Migration flows and asylum seekers across the border

Spain’s response to immigration and asylum has largely been shaped by its status as the EU’s southwest border. According to official data, over the last twenty years more than 360,000 people have arrived on the Spanish coast and in the cities of Ceuta and Melilla, with historic highs in 2006 and 2018, when Spain became the main destination country. Since 2018, in addition to the arrival of a substantial number of migrants from African countries including Guinea, the Ivory Coast, Senegal and Mali, the most significant increase has been observed in proportional terms of nationals from Maghreb countries, with Moroccans being the most numerous nationality in 2018 and 2019 and Algeria in the first half of 2020. Nationals from Morocco, Algeria and Tunisia accounted for nearly

30% of total arrivals in 2018, a percentage that rose to 59% in 2019 and fell slightly, although it remained at this high level (54.4%), in the first half of 2020, a year during which arrivals held steady despite the health crisis and border closures caused by Covid-19.

Moreover, the dynamics of asylum have manifested different patterns in the Spanish case. After decades in which the number of applicants was far below that of other European receiving countries (between 1998 and 2014 they did not exceed 1.5% of the EU total), during the last five years there has been a major increase, reaching a historic high in 2019 (with 118,264 applications, accounting for 19% of the European total). That year, Spain was the receiving country with the third highest number of applications⁵, behind only Germany and France.

In spite of the staging of actions to contain and deter migration on the southern border, which Nicholas de Genova refers to as a “spectacle border” (de Genova, 2015), what we have described as a “pattern of territorial deviation of asylum” in the Spanish case is surprising (López-Sala and Moreno-Amador, 2020). At present, most applications are submitted by nationals of Venezuela, Colombia and Central American countries who, after arriving via international airports, make their applications mostly within the territory (up to 97% of Venezuelans, Hondurans and Nicaraguans and 98% of Colombians). In contrast, in 2019 only 6% of asylum applications were made at border posts where Syria stands out as the majority nationality. On the other hand, among the people arriving by sea, generally clandestinely by boat, nationals of sub-Saharan countries apply for asylum when they are already within Spanish territory, and to a lesser extent at border posts. However, nationals of Morocco and Algeria, are forced to apply for international protection when they are in containment and expulsion areas such as the Detention Centres (CIE), up to 44% and 41% respectively in 2019. The explanation for this anomalous and somewhat Kafkaesque situation will be provided below.

8.3 The externalized border

Spain's main (and indispensable) partners in the control of migratory routes to its territory are Morocco, Senegal and Mauritania. In October 2018, Spain donated to Morocco, 108 vehicles and computer equipment

5 See https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

worth 3.2 million euros. Between 2019 and 2020, Morocco received 30 million euros from Spain, to be paid from the General State Budget (Council of Ministers of July 19th, 2019), which were included in the 147.7 million euros from the European Emergency Fund for Africa, as well as 389 million Euros from new cooperation programs of the European Commission (December 20th, 2019), to improve and upgrade the fleet of vehicles with which to reinforce its border control and thus repress irregular migratory flows towards Europe.

In this sense, the control of the maritime border has undergone significant changes in recent years, especially after the increase in flows in 2018 and the adoption of new collaboration agreements on migration control between the two countries⁶ after the Socialist party's return to government in June 2018. To begin with, the decrease in arrivals to coasts since the beginning of 2019 has been the result of the increased surveillance of departures carried out by Morocco on its coasts and in the camps near Ceuta and Melilla, where according to reports by human rights organizations, no violence has been spared (see APDHA, 2020).

In addition, there have been important changes in search and rescue (SAR) action protocols and, therefore, in Spanish rescue practices in the Strait of Gibraltar and the Alboran Sea, which reveal the trend to outsource rescue operations, with Spain providing maritime resources to Morocco, including infrastructure and training. Unfortunately, in practice this policy change has led to greater danger and even multiple shipwrecks and numerous deaths. In short, it represents an abandonment of the guarantee of rights such as international protection and others as basic as the right to life.

Thirdly, while previously the management of maritime arrivals at the Southern border was carried out by detaining all migrants in the various detention centres (CIEs) dispersed throughout Spanish territory, or in the Temporary Stay Centres for Immigrants (CETI) in Ceuta and Melilla,⁷ there has been a collapse of these two types of centres. The high number of arrivals and the bureaucracy and time involved in decreeing

6 See <https://www.cear.es/wp-content/uploads/2020/03/Externalizaci%C3%B3n-fronteras-Espa%C3%B1a-Marruecos.pdf>

7 The CETIs, created in 1999 (Melilla) and 2000 (Ceuta), are dependent on the Ministry of Migration, Labor and Social Security. They were conceived as mechanisms for initial provisional reception, to provide services and basic social benefits to migrants and applicants of international protection who arrived at these cities, while they were being identified and provided medical care and before being transferred to the peninsula.

internment in a CIE or alleviating the overcrowded CETIs has led to the *de facto* creation, that is, without any specific legal regulation, of new containment and rapid processing mechanisms called Centres for the Temporary Assistance of Foreigners (CATE, in Spanish) in 2018 (Barbero, 2021).

As with the *Hotspots* created by the European Commission for Greece and Italy, these centres are located in the ports where people rescued or intercepted at sea are disembarked directly into fenced enclosures, consisting of prefabricated modules that always show clear signs of being an area of detention. They are detained there for a period of 72 hours (the maximum legally allowed time) while the Spanish National Police (and FRONTEX) identify and register them (in EURODAC).

The “humanitarian border” ingredient is provided by certain organizations that deliver a range of services such as medical care and first aid (Red Cross), information on international protection (UNHCR/*Spanish Commission for Refugees* CEAR) and legal assistance (immigrant legal aid services provided by the bar associations). As mentioned earlier regarding these centres, it should be noted that the trend has been to selectively process arrivals by nationality and to transfer those mainly from sub-Saharan countries, while Moroccans and Algerians are either expelled immediately or transferred directly from the rescue boat to a CIE.

Similarly, with regard to the application for international protection, the CATEs are not authorized to formalize the application; however, after advising their lawyer (when there is one) that they wish to apply, the individual must formalize their application in the territory after they are released. This explains why migrants from sub-Saharan countries are already applying for asylum in national territory while the Maghrebi are forced to do so in the CIEs.

8.4 The reinstatement of internal borders

Although there has never ceased to be some kind of border control among EU Member States, in recent years we have witnessed a widespread and permanent reinstatement of police controls at internal borders (Barbero, 2018). In the last five years, the northern and central states of the EU have invoked the mechanism for re-establishing internal border

controls provided for in the Schengen Borders Code four times, more than in all previous years since its inclusion in 2006. Leaving aside that these movements have been intermittently affected by border closures caused by the Covid-19 pandemic, the general argument for re-establishing internal border controls has been what is referred to as “secondary movements” of migrants and refugees, with indirect references to security and terrorist threats, as in the case of France (Barbero, 2020), although recently these movements have also been affected by border closures caused by the Covid-19 pandemic.

The fundamental element of this trend towards internal border closure is reflected in the interpretation and application of the EU Dublin Regulation regarding the notion of the “first country of entry” being responsible for examining an asylum application. In this regard, it is essential to refer not only to the 26,694 applications submitted to Spain mainly by France and Germany in 2018 and 2019 (Spanish Ministry of the Interior), but also to the bilateral agreements between Spain and France (2002) and Germany (2018) for the immediate return (simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests). In other words, without enough due process of migrants and asylum seekers firstly registered in Spain and later caught in transit in those countries, there are obvious implications for the rights to individualized processes of international protection.

8.5 Spain’s position on the new Pact

All of the above helps explain why Spain, in contrast to the position of Austria and the Visegrád group countries, while accepting certain mechanisms of pre-screening border procedures for asylum seekers and migrants, has insistently defended the principles of strong solidarity and shared responsibility in European asylum policy and the establishment of a mandatory system of relocation quotas.

In a joint letter with France, Italy and Germany⁸ addressed to the Commission in April 2020, the Spanish government advocated for the establishment of a Search and Rescue Solidarity Mechanism, which would also elevate to EU level the distribution of arrivals after sea rescue, a decisive issue for migration management given the geography and the

8 <https://www.statewatch.org/media/documents/news/2020/apr/eu-ceas-de-es-fr-it-letter-to-com-4-20.pdf>

intensification, again, of arrivals to their coasts (in 2020 especially to the coasts of the Canary Islands).

In the same letter, Spain, together with the other signatories, also proposed implementing a mandatory pre-screening procedure (including registration, identification and security and medical checks) at the external borders and advocated the establishment of an updated and extended catalogue of clauses for declaring the inadmissibility of applications. The use of mechanisms for rapid resolution of asylum applications at the border has had a certain tradition in Spanish processing procedures, as Spain employed an “inadmissibility procedure” during the first decade of this century.

Likewise, the most recent implementation of the above-mentioned Centres for Temporary Assistance of Foreigners (CATE) in different segments of the maritime border is an instrument aimed at establishing infrastructure and procedures for rapid identification-processing and channelling of itineraries. This letter also supported the strengthening of agreements with third countries as part of the reformulation of asylum policy (as alluded to above, Spain has a long tradition of outsourcing migration control to third countries) and upheld the need to prevent secondary movements as one of the objectives to be addressed. It is not insignificant to mention that these secondary movements, with their intensification since 2017, have affected the bilateral Spanish-French migration agenda.

However, the letter also noted the necessity of creating a fair system based on responsibility and solidarity where the disproportionate burden of being a migration arrival country should be shared by all Member States. It is here where the Pact has probably failed the needs of Spain, but also Italy, Greece, Malta and Cyprus.

8.6 Conclusion

In conclusion and in light of the facts and policies presented here, if the Pact lumps refugees and irregular migrants together, and even equates their restriction of mobility rights, we predict that the Spanish migrant and asylum system will have no problem assuming and incorporating the Pact, because it is precisely the model that has been implemented on the Southern border for the last 20 years.

However, if flexible solidarity means internal outsourcing, that is, that Northern and Eastern countries may choose to participate in return partnerships or capacity/operational support and not fully relocation, while Southern countries necessarily have to take charge of the burden of the registration and asylum procedures, there is a high risk that places such as the Canary Islands or Andalusia (as Lampedusa or Lesbos) may become 'limbo-zones' where people are contained, and rather inevitably, their rights endangered.

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9. Migration Management: The Antithesis of Refugee Protection – The Case of South Africa¹

Fatima Khan and Nandi Rayner

9.1 Introduction

Similarly to the European Union (EU), South Africa is on the verge of forming a new deal on migration through its recently adopted White Paper on International Migration (2017). The South African Government is firmly repositioning its asylum governance system by focussing on the security risks of migration through strengthening border controls and restricting access to the country. South Africa is thus discounting potential risks associated with the blurring of international protection and migration management (Panizzon, 2019). The parallels between South African policies and those proposed in the new EU Pact on Migration and Asylum (2020) can provide practical and legal knowledge concerning the potential effects of the Pact in the EU.

1 South Africa is a party to the 1951 UN Refugee Convention Relating to the Status of Refugees (“1951 Refugee Convention”) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (“1969 OAU Refugee Convention”), both are ratified, with no reservations. These Conventions have been domesticated in terms of the Refugees Act 130 of 1998.

South Africa hosts the third-largest asylum and refugee population in southern Africa after the Democratic Republic of Congo and the United Republic of Tanzania. The Department of Home Affairs records 186 210 documented asylum seekers and 88 694 documented refugees. Most documented asylum seekers are from Bangladesh, DRC, Ethiopia, Pakistan, and Zimbabwe whereas documented refugees are from Burundi, DRC, Ethiopia, Somalia, and Zimbabwe

9.2 The persistent narrative of “bogus” asylum claims

South Africa’s policy context has largely been informed by a narrative that the asylum system is abused - and collapsing - from illegitimate claimants with falsified protection needs who are merely seeking to regularise their stay (Amit, 2011). Crush and Chikanda (2014) note that “the South African government has shown great interest in the notion of ‘mixed migration’ for it perfectly buttresses its argument that the country’s refugee system is being abused by non-refugees”.

The EU Pact (2020), in the context of solidarity and response, creates the connection between the issues of mixed migration and the need for solidarity between Member States to address the challenges of irregular arrivals of migrants and asylum seekers. The Pact also introduces fast-tracked asylum applications for applicants deemed to be misleading authorities when from ‘safe countries’ and for persons who enter the country irregularly. With fast-tracked applications, it concurrently introduces ‘swift’ returns. This is justified in the EU Pact to prevent unauthorised movements and a tool to discourage large amounts of asylum applicants from countries with low rates of refugee recognition. Although not as blatant as South Africa, the sentiment and connection has been made between migrants using the asylum system to regularise their stay, which has informed the EU Pact as seen by the emphasis on the need to manage migration.

South Africa’s response to the overwhelmed system was the adoption of the above-mentioned White Paper and the recent adoption of the Refugees Amendment Act (2017) and the Border Management Act (2020), both of which are overly procedural and severely hamper access to asylum.

None of these changes are in line with the human rights ethos of the UN Global Compact on Refugees (2018) and instead constitute a stark shift from the progressive protection laws post-apartheid. The current focus on border management in the form of pre-screening practices, the establishment of asylum processing centres, as well as the prioritisation of an asylum transit visa, have created new problems in asylum management (Carciotto and Johnson, 2017). There has been a growing consensus that restrictive and exclusionary policies and practices have contributed towards the creation of a mass population of hidden and undocumented refugees and asylum seekers in South Africa (Khan and Lee, 2018).

9.3 Access denied – border management and pre-screening

No matter whether an asylum seeker enters South Africa through a port of entry or not, the instruments at play are the Refugees Act (1998), Immigration Act (2002), and more recently the Border Management Act (BMA), which creates the Border Enforcement Authority who have the power to detain persons for illegal entry. The BMA introduces a mandatory, accelerated border procedure that undermines fair and effective adjudication of international protection claims. The Border Enforcement Authority has wide discretion on whether to arrest and detain an illegal foreigner or to deny their entry without referring to the possibility of refugee protection.

It is unlikely that all refoulement risks could be properly assessed in such a procedure by the Border Enforcement Authority. Refugees ought to be protected by Section 2 of the Refugees Act which includes a *general prohibition* of refusal of entry, expulsion, extradition, or return to other countries, and it is extended to include not only persons who will face serious harm but anyone whose life will be at risk of harm.

Such accelerated border processes envisaged by the BMA are likely to violate the principle of non-refoulement and insofar as the BMA reduces access to a fair and efficient asylum procedure it should be rejected. Currently, Covid-19 has hampered the monitoring of border activities. The presentation of border procedures through the BMA as the answer to address all ailments of the current asylum system is deceptive; it will instead exacerbate many flaws in the implementation of the asylum system.

Like the accelerated procedures in South Africa, the EU Pact proposes the establishment of accelerated procedures at the border for non-EU citizens crossing without authorisation. This accelerated procedure consists of the determination of the applicable migration avenue, the acceleration of status determinations of asylum seekers, and where necessary, swift return. Although the Pact reaffirms the guarantee to effective asylum procedures, refugees' risk being incorrectly referred to migration channels, not referred at all, and where referred, face accelerated claims. In each case, the asylum seeker risks swift return and thus a greater risk of refoulement. Furthermore, accelerated procedures lack procedural safeguards and hamper access to the asylum system.

9.4 Out of sight, out of mind?: Processing centres

The most drastic repositioning of the asylum system in South Africa has been the call to introduce asylum-seeking processing centres on the northern borders, where asylum seekers will remain while having their claims adjudicated (Immigration White Paper, 2017). From a government perspective, asylum seekers will be out of the metropolitan areas and unable to steal the jobs of South Africans. However, from a rule of law perspective, it will create insurmountable legal and practical problems.

Wherever that ‘processing’ takes place, so does the obligation to comply with the rule of law and fundamental human rights of people seeking international protection. These processing centres could easily result in the creation of refugee ‘camps’ as it currently takes South Africa between 5 and 15 years to adjudicate asylum claims (Amit, 2012). A far more worrisome fact is the current backlog with the appeals authority estimated to take more than 60 years to clear (Auditor General South Africa, 2019).

The South African government’s belief that these processing centres will be a more efficient asylum system than is currently in place is unrealistic. On the contrary, it will create new problems such as large numbers of persons stuck in these centres for many years without the right to work or freedom of movement, placing their life on hold and rendering them powerless.

Although the EU already processes claims at the border, they similarly believe that more must be done to manage the external borders in regard to the processing of applications for asylum to prevent irregular entry and movement in the country. The EU Pact indicates a belief that this will create a more efficient asylum system.

In South Africa, not only are the obstacles to the rule of law evident but asylum seekers are unable to support themselves and will become entirely dependent on others for their survival. The responsibility of taking care of these persons will fall squarely on the South African government, creating an additional burden on the state.

The establishment of such processing centres will also unnecessarily create practical challenges for asylum adjudication. The ability to have enough refugee reception officers, refugee status determination officers,

and independent appeal and review bodies on-site to adjudicate claims will be challenging to say the least. The areas earmarked for these processing centres are in vast swathes of unpopulated land, far from any major city (Parliamentary Monitoring Group, 2020). Furthermore, there are no High Courts or legal assistance personnel near these centres.

This type of 'out of sight' processing envisaged will instead create problems. It will be easily identifiable by the international community as centres ('black spots') that have failed those seeking international protection. South Africa is therefore strongly urged by South African and international human rights NGOs as well as the UNHCR to abort the asylum processing centres plan.

9.5 Asylum transit visas

The Refugees Amendment Act creates an exclusion for an asylum seeker who is not in possession of an asylum transit visa on an application for asylum and is unable to show just cause for not being in possession of the visa. The asylum transit visa is issued in terms of the Immigration Act when an asylum seeker states their intention to apply for asylum at a designated port of entry and gives them five days to report to a Refugee Reception Office. Asylum seekers who do not enter through a port of entry are unable to obtain this visa. The exclusion thus seeks to penalise illegal entry despite the right to non-penalisation in refugee law.

The EU Pact, with its introduction of accelerated procedures for asylum and deportation for persons who enter without authorisation, is analogous to South Africa's procedures to penalise irregular entry of asylum seekers and prioritise exclusion in these circumstances. It further links the asylum management and migration authorities for a more efficient system. Although the exact nature of the procedure, enabling law or policy may differ between the EU Pact and South Africa, the effect of the policies is inherently similar and has the potential to create similar issues.

The Constitutional Court in South Africa in *Ruta v the Minister of Home Affairs* (2018), already ruled on the issue of the interaction between the Refugees Act and the Immigration Act holding that the Refugees Act and the principle of non-refoulement apply to de facto and de jure refugees and thus all asylum seekers are protected by the principle of

non-refoulement. Furthermore, it also ruled that such protection applies as long as the claim to refugee status has not been finally rejected after the proper procedure in terms of the Refugees Act. Asylum seekers who do not enter through official ports of entry are not explicitly covered by either statute, though the Refugees Act covers them implicitly by the fundamental principle of non-refoulement. Thus, the Refugees Act is held to prevail over the Immigration Act in the case of asylum seekers who have not yet had their claim adjudicated.

The amendment goes against and attempts to circumvent the essence of *Ruta* by tying the criminal act of illegal entry in terms of the Immigration Act to the Refugees Act and piercing the ‘shield of *non-refoulement*’ which may only be lifted after a proper determination has been completed. The exclusion based on not having an asylum transit visa has the effect of prioritizing the management of migration over protection needs and is incongruent with human rights law in South Africa as it prioritises exclusion over inclusion.

9.6 Creating humanitarian corridors

A positive aspect of the White Paper is that it encourages South Africa to consider humanitarian assistance through special dispensation projects. Currently, South Africa has the Zimbabwean Dispensation Program, the Lesotho Dispensation Program, and is considering extending a dispensation to Malawians.

There are no specific laws which allow for a person to legally migrate to South Africa for work unless they can assert a scarce or critical skill (Immigration Act, 2002). Many low-skilled migrants from neighbouring countries enter South Africa with the sole purpose of working; thus, the creation of country-specific special dispensations to deal with economic migrants was a step in the right direction. When South Africa created the special dispensation for Zimbabweans, it provided much-needed humanitarian assistance. At the time, Zimbabwe was experiencing both political and economic instability and many Zimbabweans who came to seek asylum in South Africa felt compelled to transfer on to the Zimbabwean Dispensation Program as the permits issued were valid for four years as opposed to the asylum seeker permit that was valid for only three to six months at a time (Khan and Schreier, 2014). Asylum seekers that remained on their permits remained entitled to the full protection afforded by the Refugees Act.

The creation of this humanitarian corridor to protection was necessary but it is recommended that it should not be used to relabel refugees with ordinary migrants' status. This cautionary statement is further applicable to the EU Pact, which places a strong emphasis on the development of legal pathways to Europe and thus should include precautions to prevent the relabelling of refugees in other migration categories.

9.7 Key to making asylum work

The comparable policies between South Africa and those proposed in the EU Pact allow the EU to gain practical and legal knowledge into the effects of such policies. Consequently, the suggested key to making asylum work in South Africa can provide insight into improving the asylum system in the EU.

The key to making asylum work in South Africa is to increase compliance with existing asylum law and management, rather than introducing asylum processing centres which are strongly opposed by civil society and the UNHCR. Prominent implementation gaps that need to be addressed immediately include: inadequate reception provisions; barriers to registration; and lack of special procedural guarantees resulting from poor and inconsistent decision-making. The UN GCR, in its operationalisation by the government, should call on the assistance of stakeholders, including the EU, to assist and fix the system already in place. In December 2019 at the Global Refugee Forum in Geneva, South Africa pledged to step up the documentation of refugees in South Africa.

9.8 Conclusions

It is apparent from the above that the border screenings, asylum processing centres, and the exclusionary nature of the asylum transit visa is not entirely in line with the rule of law and will likely face serious legal challenges. It is therefore an inadequate solution to the asylum problem in South Africa. In South African law, strong precedents have declared unconstitutional anti-protectionist policies such as pre-screening –

whether at the border or the refugee reception offices.² The reasoning of these judgements has not only relied on the South African Bill of Rights (modelled similarly to the International Covenant on Economic, Social, and Cultural Rights), but has also been enriched by judgements from international law and various judgements of the European Union.

This repositioning of asylum management is a threat to the rights of refugees and asylum seekers. Much of the work done by civil society and the judiciary in protecting the rights of refugees and asylum seekers has been undone by the most recent amendments and regulations. Unlike the human rights ethos that was overwhelmingly present in the approach post-apartheid, the new amendments and regulations appear to be informed by the widespread xenophobia in the country and the need to secure borders and contain refugees (Human Rights Watch, 2020).

These inconsistencies, in addition to broad discretion given to home affairs officials and restrictive regulations, call into question the lawfulness of the amendments considering the South African democratic system and international law. South Africa has moved from an open policy of free movement to that of containment. Whether it will be able to withstand the progressive approach of the Constitution will once again be tested through our courts.

2 See case law against anti protectionist policies:

Abdi v Minister of Home Affairs (2011) ZASCA 2; *Ersuno v Minister of Home Affairs* 2012 (4) SA 581 (SCA); *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C); *Nbaya and Others v Director General of Home Affairs and Others* 6534/15; *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC); *Tantoush V Refugee Appeal Board and Others* 2008 (1) SA 232; *Scalabrini v the Minister of Home Affairs* 2018 (4) SA 125 (SCA); *Tatira v Ngozwana* (12960/16) ZAGPHC 136 (TPD) 12 December 2006.

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South African Government, Refugees Act 30 of 1998

Scalabrini v the Minister of Home Affairs 2018 (4) SA 125 (SCA)

Tantoush V Refugee Appeal Board and Others 2008 (1) SA 232

Tatira v Ngozwana (12960/16) ZAGPHC 136 (TPD) 12 December 2006

United Nations General Assembly (2018) “*The Global Compact on Refugees*” Final Draft (<https://bit.ly/2QBhGFj>)

10. A Short Sighted and One Side Deal: Why The EU-Turkey Statement Should Never Serve As a Blueprint

Meltem Ineli-Ciger and Orçun Ulusoy¹

10.1. Introduction

On 23 September 2020, the EU presented the new Pact on Migration and Asylum seeking to overhaul a system no longer working and establish a predictable and reliable migration management system. One of the key elements presented in the Pact was the promotion of tailor-made and mutually beneficial partnerships with third countries in the area of migration (European Commission, 2020a). Section 6 of the European Commission Communication titled “Working With Our International Partners” emphasises these mutually beneficial partnerships though it only mentions human rights of migrants and refugees once and makes no reference at all to the Convention relating to the Status of Refugees or the obligations of the EU or Member States towards refugees and migrants under international law. In this Communication, the European Commission notes “The 2016 EU-Turkey Statement reflected a deeper engagement and dialogue with Turkey, including helping its efforts to host around 4 million refugees”. Importantly, the Communication or any other document presented on 23 September 2020 by the Commission does not mention the legal problems that the EU-Turkey Statement has posed or the serious hurdles it has created for refugees and migrants accessing fundamental human rights.

Compatibility of the agreed measures under the EU-Turkey

¹ The authors would like to thank Ozgenur Yigit for her assistance during the editing process.

Statement with international and European refugee law and human rights law standards was widely questioned and criticized by academia and civil society (Peers and Roman, 2016; Roman, Baird and Radcliffe, 2016; Amnesty International 2017; Ulusoy and Battjes, 2017; Tometten, 2018; Moreno-Lax and Giuffré, 2019; Ineli-Ciger, 2019; Öztürk and Soykan, 2019; Kaya, 2020). It seems there is a general consensus that the EU-Turkey Statement is likely to serve as a blueprint for future European cooperation arrangements with North African countries and the new Pact does not say anything to the contrary (Tometten, 2018; Lehner, 2019; Carrera et al., 2019).

In view of these developments, this Chapter seeks to identify problems with the Statement and its implementation and detail the reasons why the EU-Turkey Statement should not serve as a model for future EU-third country cooperation in the field of migration. We argue that the EU-Turkey Statement was a reactionary instrument to deal with the “so-called” crisis framed by EU policymakers and it included a set of short-sighted and one-sided actions in a region where the reality was significantly different than the ideas put forward in Brussels. In this Chapter we identify what these short-sighted and one-sided actions are and the reasons the Statement should never be replicated.

10.2 A brief overview of the EU-Turkey Statement and its implementation to date

The EU-Turkey Statement was a reactionary instrument to deal with a complex situation namely, the arrival of nearly one million refugees and migrants by sea in Europe in 2015 (UNHCR, 2020). In April 2015, after a series of tragedies, more than 800 migrants died in the Mediterranean and Aegean Seas in just one week (UNHCR, 2020). As the news of the deaths appeared on the front pages of newspapers across Europe, Donald Tusk, President of the European Council, called the European Council to an extraordinary meeting, while Home Affairs and Citizenship Commissioner Avramopoulos was presenting a 10-point emergency action plan with a press meeting. One of the points was establishing “a new return programme for rapid return of irregular migrants from frontline EU Member States [to third countries]” (Ten point action plan on migration, 2015).

In October 2015, the European Commission reached an ad referendum agreement with Turkey in the form of a Joint Action Plan. The plan attempted to address the so called 'European migration crisis': "(a) by addressing the root causes leading to the massive influx of Syrians, (b) by supporting Syrians under temporary protection and their host communities in Turkey and (c) by strengthening cooperation to prevent irregular migration flows to the EU" (European Commission, 2015). However, failing to address several crucial issues, such as not offering any solutions for coming from countries other than Syria, the objective of the Joint Action Plan to prevent irregular migration flows to the EU was not achieved in March 2016 (Ineli-Ciger, 2019).

On 18 March 2016, in a renewed attempt to end irregular migration from Turkey to the EU, parties adopted the EU-Turkey Statement. To this end, the EU and Turkey agreed that "[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey". According to the Statement, migrants who do apply for asylum or whose applications have been determined unfounded or inadmissible would be returned to Turkey. As of February 2021, the number of persons readmitted by Turkey from Greece under the Statement was 2,139 (DGMM, 2021a).

The EU-Turkey Statement required Turkey to take any necessary measures to prevent the opening of any new sea or land routes for illegal migration from Turkey to the EU. Following adoption of the Statement, Turkey initially increased its efforts to prevent irregular migration to the EU although this drastically changed when in February 2020 Turkish President Erdogan declared that he had opened his country's borders for migrants to cross into Europe. In return for Turkey's efforts to stop irregular migration, the EU agreed to allocate €3 (now €6) billion under the EU Facility for Refugees in Turkey (NY Times, 2020). According to the EU, as of March 2020, "all operational funds have been committed – of the €6 billion, €4.7 billion is already contracted and €3.2 billion disbursed" (EU Commission, 2020b).

In the Statement, the EU also agreed that "[f]or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria". The Statement noted that priority will be given to those who have not previously entered or tried to enter the EU irregularly. This arrangement

is sometimes referred to as ‘the 1:1 resettlement scheme’. According to the Directorate General of Migration Management in Turkey (DGMM), as of February 2020, 27,825 Syrians had been resettled to 20 Member States under the 1:1 resettlement scheme (DGMM, 2021b).

These figures illustrate that the number of readmitted migrants from Greece to Turkey and resettled Syrians from Turkey to the EU were strikingly low and may even be regarded as a failure of the Statement. However, the real ‘success’ of the Statement can be identified as creating a legal and political limbo that would be used as a deterrence tool as well as a blueprint for future agreements.

10.3 EU-Turkey Statement. A one-sided instrument to deal with a complex situation

Both the March 2016 Statement and the Joint Action plan preceding it essentially follow the ‘externalisation’ policy of the EU and act as another step in the direction of placing migration management at the heart of EU’s external relations. Right from the start, the Statement does not take the priorities of and difficulties faced by Turkey and Greece in offering protection to large number of asylum seekers into consideration (and more crucially: migrants themselves) and establishes a plan to curb irregular migration to western EU states while turning the Aegean region to ‘borderlands’.

10.3.1 Whose Statement is it? The authorship problem

The legal nature and the authorship of the Statement has been much contested (Peers and Roman, 2016; Carrera et al., 2017). The Court of Justice of the EU (CJEU) dismissed the action seeking annulment of the EU-Turkey Statement on the basis that authorship belongs to the Member States and Turkey and it lacked jurisdiction to hear and determine the case (Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council); whereas, the European Court of Human Rights identified the Statement as an instrument concluded between the Member States and Turkey in *JR and Others v Greece*.

One might present two perspectives regarding the authorship problem. First, one might argue that the ambiguous authorship problem

of the Statement arises from the nature of the deal, not from the participants or technical aspects of it. While the final text of the Statement and 'bargaining' period were carried out by the participants of the deal, the idea and framework behind the Statement were long before decided in offices in Berlin (ESI, 2015), the Hague (Teffer, 2016) and Brussels (EU Commission, 2015). Turkey and Greece, the states that would be directly affected by the implementation of the Statement (along with the other participating states), were left to discuss the amount of money and some minor (domestic) political gains. The author of the Statement was neither an actor nor a state. The real authors were the bureaucrats and technicians simply following the externalisation playbook and helping to create ambiguity surrounding the responsibility regarding the consequences of the Statement.

A second perspective might suggest that the Statement was indeed a legal instrument concluded between Turkey and the EU. In view of the fact that the Statement was published as a press release on the European Council Website and the European Commission publishes progress reports and fact sheets relating to the implementation of the Statement, it is clear that one of the authors of the Statement was the EU. The EU denying the authorship of the Statement and the European Courts confirming this denial has two implications: first, that the Statement remains outside of checks and balances applicable to EU Law; and second, that the EU cannot be held responsible for the breaches of international law and human rights principles arising from the implementation of the Statement (Carrera et al., 2019).

Whichever perspective you choose, to date three questions remain unanswered: it is still not clear whether the Statement is only a soft law instrument; who authored the Statement; and who can be held responsible for the violations of human rights under the Statement arrangements?

10.3.2 Ending the irregular migration from Turkey to the EU. Is this objective realised?

In 2015, over one million refugees and migrants arrived irregularly in Europe by sea whereas arrivals to Greece accounted for 80 per cent of this one million (UNHCR, 2020). According to UNHCR, in 2015 799 persons had died or gone missing at sea while trying to reach the Greek territo-

ries. Whereas, this number was 174 and 70 in 2018 and 2019, respectively. In 2019, 59,726 irregular land arrivals and 14,887 irregular sea arrivals to Greece were recorded. UNHCR noted that between 1 January 2020 and 20 September 2020, there were 12,577 sea arrivals to Greece and 495 persons had died or gone missing in the Mediterranean. UNHCR figures clearly suggest that both the number of irregular arrivals to Greece and the lives that have been lost at sea (to a certain degree) have decreased since the adoption of the EU-Turkey Statement.

Although it is clear that the Statement played a role in this, the extent to which it has contributed to the decrease in the number of irregular arrivals to Greece is not clear (Spijkerboer, 2016; Reitano and Micallef, 2016; Van Liempt et al., 2017; Reslow, 2019). For instance, it is argued that changing migration routes, increased border controls on the Western Balkan route, right to work given to Syrians in Turkey in 2016 and media campaigns also played a role in the diminishing number of new sea arrivals to Greece (Spijkerboer, 2016; Adar et al., 2020; Yıldız, 2020). Therefore, although one of the most celebrated outcomes of the Statement by the European Commission is the decrease on the number of irregular sea arrivals to Greece, there is no clear evidence or objective study showing that this decrease is a direct result of EU-Turkey Statement.

On the other hand, it is clear that while the arrival of irregular migrants to Greece (albeit with a significant decrease) continues, the main benefactors of this Statement were northern and western EU Member States. The Statement did not only decrease the irregular migration to the western EU members in 2016 but it also guaranteed that these states won't experience a similar influx as long as Greece and Turkey continually act as 'buffer zones'.

10.3.3 A statement which leaves asylum seekers and migrants in limbo

The EU-Turkey Statement foresaw the return of asylum seekers and migrants who have arrived to Greece irregularly by sea. Implementation of the EU-Turkey Statement together with the hotspot approach established by the European Commission in 2015 led to the containment and long-term detention of asylum seekers and migrants in the Greek Islands in dire conditions.

The poor reception and detention conditions in the Greek islands are well documented and the absence of any measures to address COVID-19 in the camps makes it even worse (AIDA, 2020). Apart from solidarity from the local Greek population and civil society, migrants stuck in the islands are left alone without any option to go forward. The fire in the Moria camp in Lesbos once again highlighted the problem of “locked and forgotten” people in the Greek islands who have no option to go back or forward (Cosse, 2020). It is clear that long term detention of migrants and asylum seekers in poor conditions in the Greek islands is incompatible with Article 3 and Article 5 of the ECHR in addition to other human rights guarantees (Ineli-Ciger, 2019).

However, Greece is not the only actor to be blamed for this: the EU which established the hotspot approach and facilitated (if not authored) the EU-Turkey Statement is also responsible - in addition to the Member States that failed to share the responsibility of Greece and show real solidarity. The new Migration Pact acknowledging this problem proposes a new solidarity mechanism moreover, the Commission declared that it would establish a dedicated taskforce to improve the situation on the Greek islands beginning with Lesbos (EU Commission, 2020c). Yet, although improving reception conditions in the Greek islands is on the EU agenda, abolishing containment policies is not. On the contrary, the new Pact and the proposed regulations expand the possibility to further detain asylum seekers and migrants (Peers, 2020).

10.4 EU-Turkey Statement. A short-sighted reaction to a complex situation

Drafted and signed in ‘crisis’ mode, the reactionary nature of the Statement is *de facto* short sighted. Primarily aimed at ending large scale irregular arrivals of migrants and asylum seekers to the EU by sea, the Statement did not include any meaningful supervision or accountability mechanism or any additional safeguards to ensure human rights are respected. Moreover, the Statement which, among others, aimed to improve the relationship between Turkey and the EU and was a step towards energising the accession process of Turkey ended up eroding the relationship between the EU and Turkey.

10.4.1 Absence of a meaningful accountability and supervision mechanism

One of the most problematic aspects of the Statement is that there is very little data on how it is being implemented. So far the EU has published seven reports on the progress made in the implementation of the EU-Turkey Statement (e.g. European Commission, 2016; European Commission, 2020b). These progress reports were one-sided and had a number of shortcomings (Ineli-Ciger, 2017). The last progress report was published on 6 September 2017 and from that date on, no individual progress report in relation to the EU-Turkey Statement has been published by the European Commission. Since 2018, several Progress reports on the Implementation of the European Agenda on Migration and fact sheets offer fragmented data and information on the implementation of the Statement. Turkey does not publish any individual reports on how the Statement is being implemented though the website of the Turkish DGMM releases data on the number of returns from Greece to Turkey and the number of persons resettled under the 1:1 resettlement scheme.

The lack of data and confusing information on the implementation are not a coincidence since any reporting or monitoring mechanism was significantly absent in the text of the Statement. Defining itself as "...a temporary and extraordinary measure", drafters of the Statement avoided any instrument that might challenge, slow down or assess the implementation. Due to the absence of any specific monitoring or supervision bodies or accountability mechanisms, shortcomings or misconduct taking place during the implementation of the Statement cannot be identified. Furthermore, considering that the Statement has been affecting the lives of thousands of migrants and asylum seekers for the last four years - reliable and objective supervision and accountability mechanisms are needed now more than ever to safeguard fundamental rights and human dignity.

10.4.2 Readmission: From temporary and extraordinary to the new normal

The EU-Turkey Statement underlined that readmissions from Greece to Turkey "will be a temporary and extraordinary measure which is

necessary to end the human suffering and restore public order". The Statement which was agreed as a temporary measure is in its fourth year and readmission of migrants and rejected asylum seekers became a central theme in European policies to manage migration. The new Pact on Migration and Asylum puts an emphasis on 'return' and even proposes solidarity in returning people through return sponsorships.

The EU Commission identifies the legal basis of irregular migrants being returned from the Greek islands to Turkey as the bilateral readmission agreement between Greece and Turkey and notes that "from 1 June 2016, this will be succeeded by the EU-Turkey Readmission Agreement, following the entry into force of the provisions on readmission of third country nationals of this agreement." (EU Commission Press Release, 2016). It is reported that Turkey unilaterally suspended its readmission agreement with Greece in 2018 as a response to a Greek court decision to release eight former Turkish soldiers who fled the country a day after the July 15, 2016 coup attempt (Hurriyet Daily News, 2018). Moreover, Turkish Minister of Foreign Affairs Mevlüt Çavuşoğlu declared that Turkey suspended the EU-Turkey Readmission Agreement in July 2019 due to the fact that the visa liberalisation process for Turkish citizens had not been completed by the EU (Euractive, 2019). If these reports are accurate, this means the return of persons from Greece to Turkey under the Statement have no legal basis.

10.5. Conclusion

The new Pact on Migration and Asylum includes the proposal of a Regulation addressing situations of crisis and force majeure in the field of migration and asylum which seeks to provide temporary and extraordinary measures needed in the face of a crisis. It is striking that in the Explanatory Memorandum section of the proposed Regulation, the Greek-Turkish border crisis is mentioned as an example where 'temporary and extraordinary measures' can be applied due to situations of force majeure. However, the very reason we witnessed the March 2020 Greek-Turkish border crisis is the Statement itself and its one-sided and short-sighted policies.

There are precious lessons to be learned from the EU-Turkey Statement. Replicating the Statement with no amendments will harm the rule of law, violate human rights and cause further human suffering. At a

minimum, all future EU-third country arrangements should observe the following principles so as not to repeat the mistakes of the EU-Turkey Statement. First, the EU-third country arrangements should not be in the form of soft law and the EU should own these future agreements and take responsibility for the agreed measures. Second, objective and reliable monitoring, supervision and accountability mechanisms should be introduced to safeguard the fundamental rights of all persons who are subjects of these arrangements. Third, readmission agreements, as shown in the case of Turkey, can easily be denounced and persuading transit countries or countries of origin to take people back is no easy task. Hence, placing 'return' at the centre of supranational migration and asylum laws and policies is not viable and makes 'refugees' susceptible to be used as chips in readmission negotiations. Finally, containment policies which leave human beings in legal and actual limbo are not feasible ways to deal with a migration situation, crisis or not.

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11. The Global Compact on Refugees and the EU's New Pact on Migration And Asylum: The Ripples of Responsibility-Sharing

Evan Easton-Calabria

11.1 Introduction

What does 'fair and equitable responsibility- and burden-sharing' look like today, in the midst of the Covid-19 pandemic, a global recession and an ongoing climate crisis? One could argue that it has not yet manifested as envisioned in the 2018 Global Compact on Refugees (GCR) (UN, 2018) and is certainly not what the New Pact on Migration and Asylum appears to be.

Both the GCR and the new EU Pact have roots in the 2015-2016 so-called European refugee crisis, yet represent different aspirations surrounding migration. The affirmation of the GCR in December 2018 demonstrated a powerful commitment to refugee protection and cooperation in refugee responses by the international community. While the new EU Pact overall frames migration positively, it has been criticized as being based on border containment (ECRE, 2020), with increased solidarity premised on increasing the returns of rejected asylum seekers.

Recent research on the impacts of Covid-19 on the GCR, commissioned by the Danish Refugee Council (DRC), shows that the ways Europe embraces the GCR - or doesn't - pose real risks of negative domino effects in terms of global responsibility-sharing (DRC, 2020). The new EU Pact becomes embedded in this if it ends up promoting the rejection rather than the redistribution of asylum seekers, and exercises

‘flexible solidarity’ rather than true solidarity. Migration management is no substitute for international protection, which in turn should not be framed through the lens of EU interests (Carrera, 2020; see Chapter 1). When main donors such as the EU continue to reject asylum seekers and instead present refugee-hosting as a task for others to undertake – often without providing the necessary resources for it to occur sustainably or fairly – the GCR and indeed the entire refugee regime is undermined.

11.2 A false perception that the GCR is not ‘relevant’ for the EU

Despite the fact that 27 out of the 28 EU Member States at the time affirmed the GCR (only Hungary opposed it), many informants expressed the reality that it is rarely discussed or implemented within the EU. Many had the sense that for European States the GCR is an instrument to ‘implement elsewhere’ or ‘out there’. A local government official in Germany engaged in a national programme for the local integration and empowerment of refugees (conceivably highly relevant to the GCR) put it bluntly: “It is very easy to answer your question, because the Global Compact on Refugees is not relevant for our work”.

Others referenced the binding legal standards embodied in the EU legal order and the Convention regime, as well as at national levels, which are preferred over the GCR when advocating for refugees’ rights and States’ responsibilities. As an example, one head of a legal network on refugees and asylum seekers explained, “Germany has lightly embraced the Compact. Their approach will be to support other countries to support standards in the Compact. We would argue that Germany should implement all these elements of the Compact, as well”.

11.3 Protection risks in the EU

Limited asylum space and a related waning of interest in responsibility-sharing during the COVID-19 pandemic were main protection issues raised in the research pertaining to the EU and beyond. Lack of political will and leadership were discussed as key concerns driving these protection challenges. These were seen as both short-term and longer-term problems, with immediate impacts already apparent, such as asylum

seekers being refused entry into potential host countries. As one head of a European legal NGO shared regarding protection issues caused by Covid-19:

From our perspective [in Europe] the biggest challenge we have is access to territory. This was a challenge before, and Covid-19 has exacerbated it. Using legal advocacy methods to try to stop Covid accelerating is bolstering the EU's tendency to prevent people from actually accessing territory. Currently it is not even a question of access to procedure (though that is also a challenge but less complicated) - it's actually physical legal access to territory that we're struggling to obtain.

One issue raised in the research regarding the EU and the GCR was how the pandemic might accelerate the EU's externalisation agenda and in fact use the GCR to deflect responsibilities. This fear appears to be well-founded, as critics of the new EU Pact on Migration and Asylum point out that it disregards the protection needs of arrivals (and the consequences of doing so), as an ongoing EU strategy of preventing arrivals. The focus on externalisation remains, along with borders, detention and deportation.

11.4 The domino effect of restricted EU responsibility-sharing

The limited uptake of the GCR in the EU and the limitations of the new Pact on Migration and Asylum do not go unnoticed elsewhere in the world. Instead, a lack of fair and equitable responsibility-sharing in the European context – and in a context of current policies of externalising protection responsibilities – undermines the viability of the GCR as a whole.

Informants across sectors are concerned that the current dearth of resettlement to EU and other Western countries and ongoing border restrictions are setting a new norm of asylum that will have a problematic ripple effect. There is a risk of fatigue in hosting countries and an associated disinterest or disillusionment with the GCR process if GCR commitments are not realized. As one member of the Comprehensive Refugee Response Framework (CRRF) Secretariat in Uganda stated:

Countries around the world are turning inwards but this is an issue that must be looked at more holistically because we all know that refugees are an international obligation – 1.5 million refugees are not an obligation for Uganda. More refugees continue to come from DRC and South Sudan, but the international community has decided to keep quiet and say that Uganda has solutions for refugees. But now we are saying that we are confronted with a challenge. We are a poor country and it is time for the international community to wake up...this is a puzzle for the global community to think about.

A member of an INGO in East Africa further explained:

I don't see these essentially Western constructed mechanisms or protocols having any practical significance to governments in the region. Especially if they're not funded. While countries have signed on to the Compact, what we're seeing is that at the end of the day, they are reverting to focusing internally. I don't think governments in East Africa and the Horn will respond well to Western countries telling them to do otherwise when the West itself isn't... if that continues, governments here will likely say: Don't talk to us about solidarity when you are not thinking globally yourselves.

11.5 Need for increased funding – and increased political will

Reflecting on the issue of European countries closing their borders through often violent means, one NGO informant stated that it is “not an accident that this action is taking place now”, citing Covid-19 as providing permission for restrictive measures to become even further ingrained. It was noted by a researcher on asylum that in addition to combating such blatant disregard for the principle of responsibility-sharing, the revitalization of global commitments to serve and protect refugees (what is in theory the GCR) must also reimagine how the Global North, including the EU, uses the individual process of seeking and granting asylum. This unequal employment of responsibility-sharing must be systemically addressed. It is hard to see how the EU New Pact on Migration and Asylum makes great strides in this direction.

Not only does there appear to be limited uptake of the GCR tenets and mechanisms within the EU, but the pandemic has also resulted in significant funding shortfalls to address both Covid-19-related and other needs (ICVA, 2020) – thereby demonstrating that many donor states are not upholding their end of the responsibility-sharing bargain. At the time of writing, the 2020 humanitarian appeals are 33.5% funded, with the Covid-19 Global Humanitarian Response Plan just 39.8% funded by the end of 2020 (UNOCHA, 2021). Other long-term solutions-oriented responses are markedly lower, such as a 95% shortfall in the funding of the 2020 South Sudan Regional Refugee Response Plan. The lack of funding allocated to refugee response plans (RRPs) hinders the progress of the GCR as, “In the spirit of the GCR, the 2020 RRP’s seek to integrate a solutions approach placing greater emphasis on self-reliance and resilience and aligning the refugee response with other humanitarian and development country programmes”. Plans left unfunded also do nothing to support those forcibly displaced people remaining in or returning to their region of origin – arguably a key end goal of the new EU Pact (Reidy, 2020).

11.6 Where does the GCR fit in?

While the EU Pact does make note of the 2019 Global Refugee Forum (broadly seen as a key means to further the implementation of the GCR) and calls on Member States to support the implementation of UNHCR’s three-year strategy (2019-2021) on resettlement and complementary pathways, as laid out in the GCR (para. 91), several informants voiced the need for a clearer implementation of the GCR – including within the EU. One member of an international humanitarian agency stated:

Of course we have more tools if it [the GCR] is binding, but most important at this point is that the GCR gets anchored in what countries do, in national legislation, inter-ministerial operations, and internal UNHCR uptake. This work is the most critical: like the SDGs [Sustainable Development Goals], how do we get it mainstreamed at the country level...

Even in the lead-up to the affirmation of the GCR, the importance of implementing it within the EU was recognised by the EU Parliament, which in April 2018 stated, “the need to reinforce the follow-up

dimension of the implementation of both Global Compacts in the near future, particularly on account of their non-binding nature, in order to avoid *à la carte* approaches by the different states involved” (EU Parliament, 2018). Concrete suggestions included the establishment of benchmarks and indicators to enable close monitoring of implementation, and the provision of resources to the UN and its relevant agencies to enable the implementation and follow-up of both the GCR and the Global Compact on Migration. However, even before the formal affirmation of the GCR there were fears that “the EU’s commitment to the GCR is undermined by the different measures currently used or proposed to shirk rather than share responsibility for refugees” (ECRE, 2018). Unfortunately, this statement remains relevant today.

At the same time, some research informants saw value in invoking the GCR in advocacy surrounding asylum seekers’ access to EU territory. This is sorely needed today, particularly given that the EU Pact does not present a roadmap for legal migration. One informant stated:

The GCR could be useful in this. In general what we need is a strong statement and strong work from UNHCR and IOM, and then also from the European Commission, the courts, anybody with any power to not allow states to use Covid to limit access to territory with impunity. To either insist, put pressure, use whatever tool available to remove the barriers to access – and also make it so problematic that States decide not to continue it.

Indeed, it could be argued that one of the most significant contributions the EU could make to implementing, and indeed upholding, the GCR is through expanding safe and legal routes to the EU. One of the tensions apparent between the EU Pact and the GCR in this regard is that ‘migration management’ risks becoming a means to offer substitutes to asylum through dangerous third country arrangements rather than truly creating access to it.

While it has been posited that with the new EU Pact “Commission officials have put forward a bold strategy that responds to the political demands and constraints of the present day” (Beirens, 2020), it is hard to not also perceive the shift from the so-called harmonization of the Bloc to the differentiation of it as representing troubling advances in isolationism that do not bode well for other international agreements such as the GCR.

11.7 Conclusion

At the end of the day, an affirmation of the GCR should translate into a commitment to and respect for the underlying principles of more predictable and equitable responsibility-sharing in policies and practices, including those in the EU. It thus follows that the New Pact on Migration and Asylum should uphold the tenets of global responsibility-sharing and respect such fundamental rights enshrined in the EU Charter as the right to asylum (Article 18) (EUFRA, 2007) – and the EU should also remain deeply cognizant of the importance of its role within the global protection regime.

Ultimately the GCR is one tool out of many to advocate for refugee protection and responsibility-sharing, but not one that should be disregarded within the EU or within the EU's New Pact on Migration and Asylum. Today, in the face of rising border restrictions, disappointing political outcomes and ongoing xenophobia, we need to make use of all the tools we have.

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12. South American De Jure and De Facto Refugee Protection: Lessons From The South

Leiza Brumat and Luisa Feline Freier

12.1. Introduction

This Chapter discusses the characteristics of refugee protection in South America, including *de facto* protection stemming from the region's mobility regime. In light of the recently released European Union (EU) Pact on Migration and Asylum, which adopts a sharp distinction between 'refugees' and 'irregular migrants,' the former referring to individuals who deserve protection and the latter to those who should be detained and returned (Carrera, 2020; see Chapter 1), we suggest that South America presents an interesting case of a dual regional regime for mobility and refugee protection. This regime makes the distinction between irregular entry and stay, on the one hand, and asylum seekers and refugees, on the other, almost irrelevant in practice, as irregular migrants have access to basic rights and legal residence, in many cases. The region further combines this dual human rights-focused regime with an informal regime based on policy practice, which allows people to move - and find protection - across borders.

More specifically, we focus on Venezuelan forced displacement - the largest displacement crisis the region has ever faced. We further ground our analysis in South America, as the region has developed a human mobility regime (Brumat, 2020) that, as we argue, offers an alternative *de facto* form of protection. Since 2015, more than 5 million Venezuelans have moved to neighbouring countries, and over 90% of them moved within South America (Comité Español de ACNUR, 2020). In mid-2020,

close to 1.8 million Venezuelans were officially living in Colombia; 830,000 in Peru; 455,000 in Chile; 365,000 in Ecuador; and 265,000 in Brazil (UNHCR and IOM, 2020). Between 2017 and early 2020, before the Covid-19 pandemic, 5,000 Venezuelans fled their country every day (Watson, 2018) as the borders of South American countries remained largely open.

These numbers are far higher than the number of asylum seekers most European countries received during the Mediterranean refugee crisis. While the EU, with a total population of around 450 million persons (World Bank Group, 2021), received 1.5 million Syrians at the height of the crisis (Medecins Sans Frontiers, 2015), South American countries, with a similar population (430 million, Statista, 2021), received over 4.5 million Venezuelans in the last four years. Although the Venezuelan exodus slowed down due to the pandemic, it never ceased and experts expect the outflow to significantly increase once borders across the region fully reopen (Luzes and Freier, 2020).

12.2. Latin America's formal refugee protection regime

Freier (2015) identifies five phases of Latin American refugee policy liberalization since the mid-20th century: (1) the ratification of the 1951 Convention in the 1960s; (2) the ratification of its 1961 Protocol in the 1970s; (3) the adoption of a constitutional right to asylum; (4) the incorporation of the Cartagena refugee definition since the 1980s; and (5) reforms of domestic refugee laws since the 2000s.

The Cartagena Declaration is the flagship instrument of this liberalization of Latin American asylum governance. In 1984, state representatives met in Cartagena, Colombia, to discuss workable solutions to the contemporary Central American refugee crisis. The Cartagena refugee definition, formulated as a result of that meeting, extended protection to “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. Regional action plans and declarations further supplemented these developments: the 1994 San José Declaration on Refugees and Displaced Persons, the 2004 Mexico Plan of Action, and the 2010 Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas. To this day,

most South American countries have included the expanded definition of refugee from the Cartagena Declaration into their national laws (Marcogliese, 2019), alongside a human rights-centred approach to refugee protection.

Recently, Freier and Gauci (2020) have compared Latin American refugee laws to EU protection standards, based on the legislative good practices that the United Nations High Commissioner for Refugees (UNHCR) identified in Latin America. They found that six Latin American countries - Argentina, Brazil, Costa Rica, Ecuador, Nicaragua, and Mexico - surpass EU protection standards. Overall, Latin American laws are especially progressive regarding the scope of protection and the socio-economic integration of both asylum seekers and refugees. In South America, Brazil and Argentina offer interesting cases, as the constitutions of both countries include the right to asylum (Marcogliese, 2019). Brazil was the first South American country to adopt a 'progressive' approach to refugee protection in 1997, via Law No. 9,474. Argentina approved Law No. 26,165 in 2006.

Both of these laws not only adopt the 'expanded' refugee definition of Cartagena, but also extend the same rights of nationals to refugees, except the right to vote in national elections (Marcogliese, 2019). Furthermore, the Argentinian law is exceptional (Freier and Gauci, 2020) in that it stipulates a) that asylum-seekers are protected by the principle of non-refoulement from the moment they are subject to the country's authority, even outside its territory, b) group determination of refugee status in case of a mass influx of asylum-seekers, and c) that authorities will take into account the needs and the cultural values of the applicant when considering requests for family reunification. Both countries provide the possibility to grant humanitarian visas, as well as pathways to legal status, for victims of environmental disasters (Freier and Gauci, 2020). They also grant both refugees and asylum seekers the right to work, call for a swift accreditation of foreign degrees, and offer full access to public healthcare and education.

Freier and Gauci (2020) suggest that the EU should look to Latin America regarding the expanded Cartagena definition of refugee, the principle of non-refoulement, and strengthening socio-economic and political integration of asylum seekers and refugees. In both regions, recent 'migration' or 'refugee' crises have challenged each country's

capacity to deal with larger inflows of asylum seekers and migrants in need of protection. Indeed, Venezuelan forced displacement has posed the first real test to Latin America's progressive refugee legislation.

12.3. *De facto* protection through the regional mobility regime

Since 2017, when emigration from Venezuela increased dramatically, South American countries started to debate the adequacy of governance tools to manage these flows. Two contentious issues emerged. The first was the question of whether Venezuelans should be considered migrants or refugees, as there was no regional consensus on whether or not to extend refugee status *prima facie* to them based on the Cartagena definition of refugee. Both academics and UNHCR called for the recognition of the majority of Venezuelans as refugees (Freier, 2018; UNHCR, 2019), and the applicability of Cartagena recognized by many policy-makers in private conversations (Freier, 2018). Thus far, only Brazil and Mexico have applied the Cartagena refugee definition to a significant number of Venezuelan asylum seekers (Blouin et al., 2020).

The second issue was that Venezuela was the only country that had not ratified the Residence Agreement (RAM) of the Southern Common Market (MERCOSUR) (*Acuerdo Sobre Residencia Para Nacionales de Los Estados Partes Del Mercosur, Bolivia y Chile*, 2002), which could potentially give legal migratory status to most Venezuelans living in other South American countries. Even though the legal status of Venezuelans and the protection of their basic rights had been discussed in many regional meetings since 2017 (Freier and Parent, 2019), South American countries could not agree on the application of a common approach to deal with this crisis. Most South American countries decided to adopt diverse *ad hoc* measures, such as temporary visas and border mobility cards (Acosta et al., 2019). Only Argentina and Uruguay decided to unilaterally apply the RAM to Venezuelans.

The RAM was signed in 2002 and entered into force in 2009. All South American countries, except for Venezuela, have ratified it. The RAM is regarded as a milestone in regional migration governance in South America, as it is a central part of the regional regime that facilitates the movement of persons within South America, promoted by the

two main regional organizations: the Andean Community (CAN) and MERCOSUR (Brumat, 2020). The RAM creates a free residence regime that focuses on equal treatment, socio-economic inclusion and regularisation. The RAM provides the right of residence for up to two years, after which migrants can apply for permanent residence after proving a 'lawful source of livelihood' (Article 5 of the RAM), independent of the legal status and economic situation of the person and whether migration was 'voluntary' or 'forced.' Thus, the regular vs. irregular status of migrants is not paramount for migrants' access to rights and regularisation. This constitutes a fundamental difference with the EU Pact, which is centred on the 'control' and 'return' of irregular migrants (European Commission, 2020).

Both temporary and permanent residence permits guarantee a wide set of rights that could work as *de facto* protection. These rights include treatment equal to that of nationals, civil rights equality, family reunification, the right to send remittances, and special rights for children born in one of the Member States (including access to education) (Articles 7 and 9 of the RAM). This means that the RAM can be used for granting residence rights to refugees as an alternative to formal refugee protection. As the Argentine example shows, more than 200,000 Venezuelans have already obtained the right to residence in Argentina through the RAM in the last four years (UNHCR and IOM, 2020).

In addition, the human rights approach to migration adopted by the South American Conference on Migration (SACM) needs to be highlighted. Countries across the region have committed themselves to avoid deportations of nationals of other Member States (*X Conferencia Sudamericana Sobre Migraciones. "Avanzando Hacia Una Ciudadanía Sudamericana"*. *Acta de Acuerdos y Compromisos Asumidos*, 2010), alongside relatively easily accessible bureaucratic procedures and documentation for obtaining legal residence (Brumat, 2020). The underlying logic of this mobility regime is that, as migration is an 'inevitable' phenomenon, people will keep crossing borders (Brumat and Acosta, 2019). Consequently, the solution to irregularity is regularisation, not deportation. While scholars have pointed out structural implementation gaps between South American rights-based migration and refugee legislation (Cantor et al., 2015), and protection gaps for extra-regional nationals (Acosta and Freier, 2015), the mobility regime offers room for creative alternative approaches to protection, and allows civil society across the

region to insist on its implementation and the protection for all.

12.4. Conclusion: Lessons from the South

South America presents an interesting case that could offer some lessons for other world regions. Unlike Europe, its regional refugee regime does not create 'external borders', so there is no need to enforce them, in sharp contrast with the new EU Pact on Migration and Asylum. At the same time, the South American intra-regional regime works in at least two different, and sometimes contradictory, ways. On the one hand, legislation - the formal dual regime - is exceptionally progressive with a view to the expanded refugee definition of Cartagena and the socio-economic integration of both asylum-seekers and refugees, but also of intra-regional migrants. For example, across the region, Venezuelans can work as soon as they arrive in most host countries, regardless of their status as economic migrants, asylum seekers or refugees (Freier, 2019). Given the largely informal character of South American labour markets, even irregular migrants start working as soon as they arrive in their destination country, and in some countries such as Argentina, their labour rights are protected.

On the other hand, formal refugee legislation coexists with different policy practices, some of which are restrictive and violate the international obligations that these countries have, while others offer alternative protection for refugees. For example, most South American borders have remained open to legal Venezuelan immigration despite the large scale of this displacement. Other countries, such as Ecuador and Peru, have limited legal entry for domestic political reasons (Freier and Castillo Jara, 2020). In either case, there is regional awareness that borders are porous and that it is not possible to stop people from migrating (Brumat, 2020). Following this logic, even for countries that have seen recent restrictive policy shifts towards Venezuelan immigration, the solution to irregular arrivals is not deportation, but regularisation.

South American countries have opted for migrant regularisation, not only because of an ideological paradigm shift, which led States to increasingly follow a human, or migrant' rights- based approach in the past 20 years (Cantor et al., 2015), but also because of pragmatic reasons (Brumat, 2020). A regularised migrant population is easier to integrate into society and the formal economy, which benefits the state, especially in the case

of highly skilled migrants. Migrant regularisation is also paramount from a public health approach, especially in times of Covid-19 (Freier, 2020). Although there are significant intra-regional differences and increasing resistance to regularisation due to the large scale of Venezuelan displacement in some countries, overall this stands in opposition to the logic that prevails in the EU. As seen in the recent Pact, its underlying logic is set on blocking the arrival of those who seek protection (Carrera, 2020).

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13. Building Resilience in Strained Refugee-Hosting States? The EU in The Face of Lebanon's Cumulative Crises

Tamirace Fakhoury

13.1 Introduction: Setting the context

The European Union's Southern Neighbourhood has gone through major upheavals in recent years. Revolutionary episodes and their spillovers have instigated a heated debate about the EU's ability to find solutions for the regional root causes of conflict and dispossession (Huber, 2020). Displacement from Syria has emerged as "one of the largest, most complex and protracted humanitarian emergencies today" (Knudsen, 2020). Syria's neighbouring polities (namely Lebanon, Jordan, and Turkey) have taken in more than six million displaced Syrians. In this context, they have evolved into key hosting states in the international refugee regime even though they officially declare themselves to be no-asylum countries.

Within this climate, the EU's refugee diplomacy has consisted of boosting these countries' abilities to host refugees while governing the challenge of displacement from a distance (Fakhoury, 2019b). To this end, it has provided regional host states with financial incentives and partnerships that would prompt them to host refugees while equipping them with protection tools. Under the motto of resilience-building, the EU's approach has emphasized the need to synchronize cooperation and migration management with development (Fakhoury, 2019a). In this vein, the refugee challenge would evolve into a development opportunity for both host and refugee communities. The EU's key policy instruments,

ranging from the European Neighbourhood Policy to more tailored instruments such as the Compacts, stress the importance of reinforcing the ability of both refugee and host communities to bounce back in the context of adversities and shocks (European Commission, 2015; European Economic and Social Committee, 2016). At the same time, in light of divisions over burden-sharing and given the limited resettlement opportunities that refugees have had, the EU has sought to embed resilience-building in the countries of first arrival within a broader politics of regional containment (Anholt and Sinatti, 2019).

13.2 The EU's regional approach in the context of displacement from Syria

Insofar as the EU's Southern neighbourhood is concerned, the EU's New Pact on Migration and Mobility offers no novel perspective (European Commission, 2020). It is to be read in the context of the EU's approach of consolidating regional stabilization and resilience while governing migration from afar. In this light, the New Pact builds on the EU's repertoire of policy tools that turn migration management into a key pillar for shaping neighbouring regions (Bialasiewicz et al., 2013). With the arrival of more than one million Syrians to Europe by 2015, the EU devised new partnership frameworks with third countries on migration, including Syria's neighbouring host states. One of these partnership pillars is to design 'comprehensive partnerships' that leverage the EU's funding power in sectors such as development and trade (European Economic and Social Committee, 2016). 'Positive incentives' revolve around providing financial arrangements, equipping host states with a toolbox of capacity-building programs, and devising trade facilitation schemes (European Economic and Social Committee, 2016). In return, host states would be encouraged to improve the integration of refugees into their societies and labour markets (European Economic and Social Committee, 2016). The EU-Turkey refugee deal and the EU-Jordan compact are cases in point (Corrao, 2019; European Commission, 2016a). According to the EU, these policy instruments twin development, refugee protection and stabilization. In other words, they aim to strengthen the capacity of local refugee protection regimes while fostering the resilience of refugees and providing them with solutions close to their countries of origin.

Still, as many analysts argue, this approach has yielded complex conse-

quences. First, these partnership tools cater to the EU's logic of externalisation. In line with the logic of containing migration, they offer avenues to discourage the departure of potential asylum seekers to Europe. Secondly, by devising package instruments that cater to the mutual interests of the EU and partner governments in areas such as trade or border management, they turn refugee hosting states into co-partners in migration management. Not surprisingly, these policy scripts have various backlash effects. Through this policy lens, the EU seeks to 'construct' Syria's neighbours into first asylum countries although they have always been transit countries that have refused to provide durable solutions to the displaced.

Historically, such countries have looked at *refugeeness* through the lens of temporary hospitality and guesthood. In key junctures of displacement, they have opened their borders only to close them as displacement evolved into a protracted refugee challenge (Yayha and Muasher, 2019; Fakhoury, 2018). They have furthermore buttressed 'local closures' in the face of displaced individuals such as curfews, mobility restrictions and confinement in settlements and camps, affirming and reaffirming the narrative that they are no destination for those seeking refuge (Mourad 2020).

Lebanon provides a key case for understanding how the EU's regional refugee approach has led to contestation and incoherence (Del Sarto and Tholens, 2020). Seen in this light, the EU's goal of reconciling resilience-building has had an uneasy relationship with the pragmatic goal of deterring asylum. It has also encroached on rights-based refugee humanitarianism (Lavenex and Fakhoury, n.d.).

13.3 Lebanon and the EU: Clashing logics?

Lebanon has been a key site for widespread displacement from Syria since 2011, and the EU has been the main funding power that has provided refugee aid since then. The country is not a signatory to the 1951 Convention. Still, since 2011, in a context of divided bureaucracies and elite cartels, it has hosted more than one million Syrian refugees (Fakhoury, 2020). At the beginning of the conflict, the Lebanese government adopted a loose policy of border regulation. Soon, however, a securitized politics of refugee containment superseded the open-border approach. In 2015, the government ordered the borders to be shut down except for humanitarian cases. It also asked the UN Refugee Agency to stop registering

refugees.

In the last years, Lebanon has witnessed an acute securitization of the refugee question. Politicians have portrayed refugees as security and economic threats, and mostly as threats to Lebanon's sectarian power-sharing arrangement which rests on safeguarding the balance of power between Christians and Muslims. As soon as the Syrian regime re-established its authority on Syrian soil, various political parties began continually lobbying the international community for Syrian refugee return, stressing Lebanon's overstretched capacity. Municipalities and security forces have enforced practices that have significantly restricted Syrians' access to legal residency, employment and housing and have reduced their livelihood opportunities (Medina, 2020).

Municipalities have enforced illegal curfews that have limited refugee mobility especially in times of Covid-19 (Chehayeb and Sewell, 2020). Armed forces have also demolished refugee shelters in the name of environmental violations even though displaced individuals have increasingly been unable to afford decent housing (Human Rights Watch, 2019a). Moreover, security forces have intensified their crackdowns on Syrians who have worked in the informal labour market. This has occurred although the Lebanese government has made it almost impossible for Syrians to obtain legal labour permits. In parallel, the political elite have scaled up calls for refugee repatriation (Fakhoury and Ozkul, 2019). In coordination with Syrian authorities, the government has moreover been processing applications for return.

In a nutshell, Lebanon's asylum policy has increasingly consisted of making it unbearable for refugees to stay. Lebanese General Security has reported that about 170,000 Syrians have voluntarily returned to Syria – although the numbers are contested (Human Rights Watch 2019b). Still, researchers have cautioned against these so-called voluntary returns. Push factors such as recurrent evictions, denial of rights and marginalization from access to services have coerced Syrians into searching for alternative options (Mhaissen and Hodges, 2019).

Against this background, Lebanon's realities have been at odds with the EU's proclaimed resilience-building approach. Since the onset of refugee flight from Syria, the EU has upscaled its cooperation with Lebanon, framed in the EU's key policy instruments as a prioritized host country. It has also embarked on a series of cooperative dialogues with

Lebanon's successive governments in the search for mutual benefits as to how Lebanon and the EU could benefit from regional refugee cooperation. The EU and Lebanon's governing powers have thus discussed support to security reform, governance, development and trade in the context of the refugee challenge. In 2016, in the framework of the London Conference for Supporting Syria and the Region, the EU and Lebanon signed the so-called Lebanon Compact (European Commission, 2016b).

Vague and less ambitious than the EU-Jordan compact, the compact promises to explore avenues for facilitating the temporary inclusion of Syrian refugees and their integration into the job market (Howden et al., 2017; EU-Lebanon Association Council, 2016). Nonetheless, it affirms the primacy of Lebanon's sovereignty and labour laws (EU-Lebanon Association Council, 2016). In the context of the four Brussels conferences that the EU has co-hosted since 2017, Lebanon and the EU have spelled out respective commitments in view of boosting refugee inclusion. Objectives such as facilitating refugee documentation procedures, allowing refugees to work in restricted sectors and facilitating their access to education and health as well as registering Syrian children born on Lebanese soil arise as key projected outcomes of this cooperation.

Cooperation has however been a bumpy ride and spelled out commitments on the part of the Lebanese government have turned out to be aspirational. In practice, despite the EU's funding power and its palette of positive incentives, Lebanon has increasingly securitized its approach towards refugees, and turned a blind eye to the EU's rhetoric of resilience-building. Today, according to UNHCR, more than 70% of surveyed Syrians do not hold a legal permit (UNHCR, 2019). Furthermore, the number of job permits for Syrians that have been issued have remained extremely limited (Howden et al., 2017). Soon enough it has become clear that the EU's search for refugee solutions on Lebanese soil and its quest for building resilience for both host and refugee communities hold no achievable outcomes. Here, several factors come into play.

The EU's refugee approach which seeks to entice Lebanon to facilitate refugee inclusion and to foster refugee resilience, has been at odds with Lebanon's geopolitics of asylum (Fakhoury, 2020). It is true that the EU was able to inspire a conversation on improving refugee inclusion in policy spheres. As underscored, with the adoption of the 2016 Compact which promised funding in return for the Lebanese government relaxing

measures vis-à-vis Syrians' temporary stay, the government pledged to deliver on some reforms. In 2017, it announced its decision to waive the USD 200 refugee residency fee enabling Syrian refugees to renew their legal stay. These commitments turned out to be fleeting rhetoric.

In the last years, soft conflicts between Lebanese officials and their EU counterparts have increased. Some Lebanese politicians have started calling on the EU to divert funds from Lebanon to Syria in the hope of incentivizing refugees to go home. Still the EU has renewed its willingness to support Lebanon's recovery in the context of the refugee challenge. Also, as Lebanese officials started lobbying for rash refugee repatriation, the EU has reiterated on various occasions that conditions for return are still not favourable, and that it proposes instead as a temporary solution "resilience-building" through humanitarian and development aid (Fleyhane, 2017). In return, key governing powers have insisted that Lebanon is no country of asylum and that the massive strains that Lebanon is exposed to will most likely backfire on Lebanon and the EU (Hall, 2019). More precisely, they will trigger refugee waves to Europe and destabilize the polity reeling from the weight of so many burdens.

In this light, various Lebanese politicians have criticized the EU's so-called politics of resilience-building where refugees are, framing it instead as a politics of deterrence (Fakhoury, 2018). They have also criticized unbalanced burden-sharing in the international refugee regime. These clashes have not remained pure rhetorical divergences. They have had consequences for refugees' lived realities and rights. As the EU and Lebanon have diverged on their search for refugee solutions, a logic of crisis governance has prevailed (Fine et al., 2020). This logic has privileged quick fixes that remained disconnected from local perceptions and practices.

From yet another complex perspective, the EU's refugee diplomacy in Lebanon has remained detached from an engagement with Lebanon's divided allegiances vis-à-vis the Syrian conflict and the domestic polarities that the issue of displacement has brought along (Fakhoury, 2020). Ever since Syria's lethal conflict erupted, Lebanese governing powers have held divergent positions vis-à-vis Syria's war and the refugee issue. In the context of Syria's war, some Lebanese factions have backed the Syrian regime in the face of its rivals. Others have viewed the conflict as an opportunity to weaken Syria's control in Lebanon. Amid domestic

tensions, most political factions have started portraying the extended stay of Syrian refugees, who are mostly Sunni, as a threat to Lebanon's system of sectarian power-sharing.

In this setting, the issue of Syrian refugee stay and return has become tightly enmeshed with Lebanese politicians' geostrategic interests (Fakhoury, 2020). Some political executives who are staunch allies of the Syrian regime hoped that, by advocating for Syrian refugee return, they would contribute to restoring the legitimacy of Bashar-al-Assad's rule. Within this climate, the EU's 'resilience-building' approach has been moulded by the complex geopolitics of Lebanese Syrian relations, and its policy pleas for improving refugee inclusion have remained mere ink on paper (Lavenex and Fakhoury, forthcoming).

13.4 Overlapping crises

In October 2019, a massive protest wave broke out in Lebanon. The protest wave which started in the wake of a proposed WhatsApp tax, called for overthrowing Lebanon's political leaders and changing the country's sectarian-based model of politics which promotes patronage, corruption, and inept governance. The protests, which happened on the heels of a worsening financial crash where both refugees and host communities found themselves on the verge of destitution, have called the EU to rethink its politics of resilience-building. Since then, the Lebanese pound has lost 80% percent of its value, and about 50% of Lebanese citizens have been classified as poor by the Ministry of Social Affairs. UNHCR has recently announced as well that because of Lebanon's economic crisis - further compounded by the global pandemic - more than 75% of Syrian refugees have fallen below the poverty line in contrast to 50% in 2019 (Khoder, 2020).

Here, it is no exaggeration to say that the rhetoric of resilience-building has not been backed by facts. It is also necessary to question the extent to which it has been beneficiary-led and to explore what factors have thwarted its proclaimed objectives. In this context, refugees have been thrown into more precarity, and signs of dissatisfaction and despair amongst them have become strikingly visible in the last months. Back in December 2019, some refugees started staging a sit-in at the UNHCR in Tripoli, protesting shrinking funds and precarious trajectories (Sewell, 2020). In the wake of the Beirut Blasts on 4 August 2020, Syrian

refugees began embarking on dangerous journeys in the Mediterranean (AlBawaba, 2020).

13.5 Concluding remarks and the way forward: Resilience-building as a cautionary tale?

Against this backdrop of cumulative crises, the gap between the EU's "resilience-building" rhetoric and policy outcomes on the ground has widened by the day. Following the state's recent failings, the EU has vowed to rethink its politics of cooperation with Lebanon's authorities (Apelblat, 2020). It has multiplied its calls for reforms and announced that an internationally backed economic rescue plan will be tied to conditionalities necessitating the Lebanese government begin imminent reforms. Still, the EU finds itself grappling with various dilemmas in the wake of both a grassroots movement of contestation and a massive blast that have completely discredited the political establishment. One important dilemma is cooperation with Lebanon's governing powers over Syria's protracted refugee challenge.

In the last years, the EU has developed an approach of principled pragmatism, favouring stabilization, and dialogue with Middle East and North African (MENA) governments despite their questionable track record on human rights. It has thus sought close cooperation with the Lebanese government notwithstanding the government's complex record on refugee rights. Still, with the latest episode of collapse, civil society organizations and activists have called for tracking international and EU aid and their outputs:¹ They have also called on the EU and its Member States to halt its cooperation with governing powers and to reconfigure its architecture of aid in the small state. In this regard, the EU's pragmatic refugee diplomacy with Lebanon's government - despite its bad record of public services, rule of law and accountability - has come under fierce criticism.

Against this background, the implosion of Lebanon's social contract and the deterioration of refugee rights spell out colossal challenges for the EU's external policy. Firstly, how can the EU build on Lebanon's overlapping crises to develop an external policy that is more attuned to people's and refugees' aspirations? And how can its funding power have

1 Authors' conversations with activists 2019-2020.

more tangible effects on improving the livelihoods and rights of both refugee and host communities? Finally, what are the implications and risks of cooperating with host governments and economies in which social contracts are imploding?

In Lebanon, the current social contract between the government and its citizens as well as its non-citizens does not hold anymore (Collard, 2020). As it falls apart, refugees are mired in a complex struggle (El-Taliawi and Fakhoury, 2020). A resilience-building approach built on comprehensive policy partnerships is more likely to produce severe backlash effects as far as vulnerable communities are concerned, when the roots of vulnerability are not duly tackled, and when 'resilience-building' remains disconnected from an underlying protection environment. Lebanon's successive crises, ranging from the financial crash to the Beirut Blasts, have broader insights to convey. It cautions the EU against the perils of cooperation, and mutual partnerships with third countries when an underlying 'rights-based environment' and legal remedies for refugees remain absent. It also cautions against glorifying resiliency humanitarianism as a surrogate solution for rights-based humanitarianism (Turner, 2019).

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14. South America and The Cartagena Regime: A Comprehensive Approach to Forced Migration Responses

Gilberto M. A. Rodrigues

14.1 Introduction

Latin America has developed a specific regional regime for refugees. The 1984 Cartagena Declaration on Refugees (UNHCR, 1984) had set a landmark recommendation to all countries in the region: the need to amplify the Geneva Convention of 1951's refugee definition to incorporate human rights mass violations as the "sixth reason" for the refugee determination process. Starting from this bedrock conceptual framework, the Cartagena Regime evolved and included other innovative ways regarding protection and solutions for refugees in the last 35 years. Particularly in South America, there has been a comprehensive approach to forced migration responses with lessons learned that could be useful for comparative studies and policy debates, including those regarding the new European Union 2020 New Pact on Migration and Asylum (European Commission, 2020).

14.2 The cartagena regime

The 1984 Cartagena Declaration on Refugees is a non-governmental document approved by academics and UNHCR officials in a Colloquium held in Cartagena de las Indias, Colombia, in November 1984. The document addressed a refugee crisis within a critical situation in Latin America at that point. Civil wars, international interventions and massive human rights violations in Central America were producing hundreds of

thousands of refugees. Neighbourhood host countries had no legal provisions to recognize those people under the 1951 Refugee Convention' standards.

Gradually, with UNHCR regional support as well as NGO actions, Latin American countries began introducing the 'massive violations of human rights' clause (which may encompass situations such as authoritarian regimes, humanitarian crises and civil wars) in their national legislations. The new conceptual framework enlarging the Geneva Convention of 1951 definition was adopted voluntarily by each country thus transforming the 1984 Cartagena Declaration into an affective regional soft law. The Cartagena Regime (Jubilut, Espinoza, Mezzanotti, 2020) became much more complex and comprehensive than its starting point, including protection and durable solutions' regional mechanisms that have been developed in its 35 years of existence.

A political commitment by the majority of the countries in the Americas, in partnership with UNHCR, has defined a political agreement to organize a summit every ten years in order to evaluate and update the Cartagena Regime (Cartagena +). Thus, it has now four declarations (1984, 1994, 2004 and 2014) and two plans of actions (2004 and 2014) comprising the content of the regional regime,¹ which includes protection and durable solutions mechanisms, some of them unique (UNHCR, 2014).

14.3 The cartagena regime and the global compact on refugees

The importance of regional and subregional approaches was valued by the Global Compact on Refugees (UN, 2018) in its item 2.3, where it states that "Comprehensive responses will also build on existing regional and subregional initiatives for refugee protection and durable solutions where available and appropriate, including regional and subregional resettlement initiatives...". This is exactly what the Cartagena Regime, in its 35 years of existence, represents, encompassing a broad policy framework (not binding, as explained above) that includes protection and durable solutions for intra-regional and extra-regional situations.

1 For reference by year, see: 1984, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf; 1994, <https://www.refworld.org/publisher,RRI,,,4a54bc3fd,0.html>; 2004, <https://www.refworld.org/publisher,RRI,,,424bf6914,0.html>; 2014, <https://www.unhcr.org/brazil-declaration.html>.

14.4 Contemporary refugee and migration laws in South America

South American countries have embraced the international refugee regime through their recognition of the 1951 Geneva Convention and 1967 Protocol. As part of their national regulatory process, refugee laws were approved based on the general International Refugee Law but also based on the Cartagena Regime. *Table 1* shows Mercosur countries regarding their status to both international and domestic norms.

Table 1 – Mercosur: Geneva Conv.+1967 Protocol ratification status / Refugee laws

Mercosur countries	Argentina	Brazil	Paraguay	Uruguay
Geneva Conv. 1951	Accession/1961	Ratification/1960	Accession/1970	Accession/1970
1967 Protocol	Accession/1967	Accession/1972	Accession/1970	Accession/1970
Refugee Laws	Ley N° 26.165/2006 – Ley General de Reconocimiento y Protección al Refugiado	Lei 9.474/1997 – Define mecanismos para a implementação do Estatuto dos Refugiados de 1951.	Ley N° 1938/2002 – Ley General sobre Refugiados	Ley N° 18.076/2007 – Derecho al Refugio y a los Refugiados –

Data collection by the author (2020)

Refugee laws are necessarily connected to general migration laws, which regulates the status of migrants *vis-à-vis* their rights, including residence, acquisition of nationality and other important issues regarding human rights of migrants. *Table 2* shows how migration laws in Mercosur countries evolved from a national security focus to a human rights focus over the last twenty years.

Table 2 – Mercosur countries’ migrations laws – general focus

Mercosur Countries	Argentina	Brazil	Paraguay	Uruguay	Venezuela
Previous migration laws and their focus	22.439/1981 National Security	6815/1980 National Security	470/1974 National Security	9.604/1936 National Security	19.329/1937 National Security
Contemporary migration laws and their focus	25.871/2004 Human rights Non-discrimination.	13.445/2017 Human rights Non-discrimination	978/1996 National development	18.250/2008 Human rights Non-discrimination	37.944/2004 Human rights

Adapted by Rodrigues and Silva, 2018

The intersection between refugee laws and migration laws in South America (particularly in Mercosur countries) allows asylum seekers to apply for other alternatives for provisional or permanent residence when they have their asylum applications refused by national authorities. However, those complementary protection instruments are relatively new and their implementation has been affected by a high level of discretionary power and also by restrictions imposed by regressive administrative regulations which in many cases have reduced the ground of human rights protection granted by the law as well as by the Cartagena Regime.

Yet, it should be made clear that since 2017 new right and far-right-wing governments in South America have managed migration issues with a security, nationalist approach, which has led to violations of Refugee Law (Jubilut et al., 2019). Through executive decrees and/or ordinances either Argentina (Macri’s government, 2017-2020) and Brazil (Bolsonaro’s government, 2019-present), to mention two major Mercosur countries, have tried to control borders, criminalize migrants

and downplay human rights standards of their laws regarding refugees and migrants. But in many cases courts have been provoked to intervene and suspend those illegal acts, such as the Brazil's Ministry of Justice ordinance n. 666 (Alarcón, Rodrigues, 2019), which illegality was recognized even by an atypical Brazil's UNHCR Office declaration (Brasil247, 2019), and was contested in the Supreme Federal Court (STF, 2019).

14.5 The context of forced migration in the region

It is important to contextualize the forced migration challenges that Latin America and the Caribbean region have faced in the last twenty years. The Colombian war and violence committed by the Colombian Army, paramilitary forces and guerrillas are still ongoing, despite the 2016 Peace Agreement between Colombia Government and the Colombian Revolutionary Armed Forces (FARC), a process that led the Nobel Committee to award Colombian President Juan Manuel Santos with the 2016 Nobel Peace Prize (The Nobel Prize, 2016).

In Central America, the *North Triangle* composed of El Salvador, Guatemala and Honduras has confronted long-term structural violence, aggravated by civil wars and the emergence of *Maras*, violent urban gangs. Those problems have produced long-term massive waves of forced displacement in the region.

In the Caribbean, Haiti became a top international security priority followed by the approval of the United Nations Stabilization Mission in Haiti (2004–2017),² which was mainly coordinated by South American countries, particularly Brazil, Chile and Argentina. In 2010, a huge earthquake partially devastated the island and produced a massive flux of forced migrants mainly to South America.

Finally, the political, economic and humanitarian crisis in Venezuela (Rodrigues, 2018) has produced a massive migration flux since 2016 with a huge impact on South American countries, especially Colombia and Brazil. According to 2020 UNHCR figures, Venezuela is the second highest country source with 3.7 million (refugees + displaced abroad).³

From outside the region, despite its distance, the Syrian war has

2 For more on the United Nations Stabilization Missions, see: <https://peacekeeping.un.org/en/mission/minustah>.

3 For more data, see: <https://www.unhcr.org/figures-at-a-glance.html>.

also impacted the region, as the Syrian community is strong in many South American countries, which favoured reception and governmental policies to receive them in a timely manner.

14.6 *Open borders* as a regional policy in South America

South America had a traumatic experience with *borders of confrontation* during the Cold War, in which national security doctrines played a central role in shaping international mobility as a national security issue. Military regimes agreed to cooperate in controlling their borders against the so-called *subversives* (those persecuted for political reasons), and also secretly exchange detainees who were then victims of forced disappearances through the horrible Operation Condor (Tremlett, 2020).

The re-democratization process in the 1980s brought a new era of human rights protection and border management in South America. New cooperation between Argentina and Brazil led to bilateral commitments in the late 1980s and soon after that to Mercosur in 1991 (Mercosur, 2020), built under borders of cooperation frameworks. Even policies of combating organized crime (especially narcotraffic) and its re-securitization measures adopted by many countries beginning in the 1990s - also deepened by 9/11 antiterrorist security outcomes - were not determinant in changing the pattern of open borders for receiving forced migrants. The 2004 Mexico Declaration and Plan of Action established the concept of *solidarity borders*, calling governments to keep their borders open to receive forced migrants. This was particularly important in South America with the Colombian conflict (Ecuador and Venezuela's borders with Colombia); and more recently with the Venezuelan conflict (Colombia and Brazil's borders with Venezuela). However, the Covid-19 pandemic has changed border control due to emergency sanitation norms restricting entry to foreigners without permanent residence permission.

14.7 *Non-refoulement* principle and legal limits to deportation

Non-refoulement is a bedrock principle of International Refugee Law entrenched in all national refugee laws in South America. This principle goes beyond refugee laws themselves and links migration laws limiting

the possibility of deportations of non- recognized refugees who could be in danger if deported. *Table 3* shows how Mercosur migration laws deal with this issue.

Table 3 – Mercosur countries’ migrations laws – deportation & access to justice

Mercosur Migration Laws	Argentina Law 25.871/2004	Brazil Law 13.445/2017	Paraguay Law 78/1996	Uruguay Law1 8.250/2008	Venezuela Law 37.944/2004
Deportation and access to justice	Deportation should respect due process of law; migrants have the right to access justice without costs	Deportation should respect due process of law; migrants have the right to access justice without costs	Non admission of for- eigners who may represent risk to public health	Non admission for lacking documents or partic- ipation in crimes against humanity, genocide; human, drug trafficking condemna- tions.	Non admission of for- eigners who may represent risk to public order and inter- national relations

Adapted from Rodrigues and Silva, 2018

14.8 Humanitarian visas and qualifications: their role and limits

Humanitarian visas are a complementary form of protection, which “grant legal status to people who are not recognized as refugees under the Geneva Refugee Convention, or the Cartagena Declaration, but whose return is contrary to States’ obligations to the principle of *non-refoulement*” (Freier and Gauci, 2020).

In 2012, they were applied to Haitians as part of an accommodation process regarding Brazil’s CONARE decision which did not recognize them as refugees. Assuming their vulnerable condition and the impossibility to repatriate them to Haiti (due to the critical situation the country

has confronted since its 2010 earthquake), Brazil's National Immigration Council (CNIg) conferred Haitians humanitarian visas, recognizing their vulnerable situation, allowing them provisional residence permission, which was later converted to a permanent one for most of them under some conditions.

After the humanitarian visa solution for Haitians, Brazil's government applied a similar measure for Syrians in 2013. The aim was to accelerate the Refugee Status Determination (RSD) for Syrians settled in a first host country. Through a *fast track* procedure visas and qualifications for Syrians (Rodrigues et al., 2017) were, in fact, part of Brazil's commitment to contribute to share the burden of the Syrian crisis that had begun in 2011.

UNHCR celebrated the legal alternative of humanitarian visas as a complementary protection in line with UNHCR standards. The 2014 Brazil Declaration and Plan of Action stressed that possibility. Brazil, Argentina, Uruguay and Venezuela migration laws included provisions related to that, either for entry or residence permissions. Nevertheless, some experts, such as Laura Madrid Sartoretto and Diego Arcarazo (2020), Giuliana Redin (2020), and myself as well, see this kind of complementary protection as a possible lack of political will to support Refugee Status Determination (RSD) based on the broad Cartagena definition, due to less responsibilities the state assumes with those humanitarian migrants.

14.9 South-South cooperation and extra-regional resettlement

Extra-regional and intra-regional resettlement was part of the South-South cooperation South America countries implemented since 2005 and based on the resettlement in *solidarity* of the 2004 Mexico Declaration and Plan of Action (also included in the 2014 Brazil Declaration and Plan of Action). In this regard, Palestinians were resettled (Espinoza, 2017), but in a limited way. The same happened with Syrians, who could have benefited from assistance from Syrian communities in many South American countries, yet were limited due to the distance from their origin.

Intra-regional resettlement was implemented in Latin America in 2005, based on the Solidarity Resettlement Program, which was “designed as a protection tool and a durable solution for Latin American refugees (primarily of Colombian origin) who faced risks in neighbouring countries”. The Program was also “a mechanism for international solidarity and responsibility sharing among the region’s states, seeking to bring relief to those countries hosting the greatest number of refugees” (Marcogliese, 2017). Between 2005 and 2014, around 1.151 refugees, mainly Colombians, who were settled in Ecuador and Costa Rica were resettled to Argentina, Brazil, Chile, Paraguay and Uruguay.

14.10 Venezuelans and *prima facie* RDS by Brazil’s CONARE

Another important protection measure that was provided for the first time in Latin America was Brazil’s decision to recognize *prima facie* thousands of Venezuelans (ACNUR, 2020), based on the “human rights massive violations” clause therefore eliminating interviews and other procedures for the RDS. This decision made by Brazil’s CONARE in December 2019 (followed by other similar decisions in 2020) is considered by UNHCR and many experts one of the most relevant ones regarding protection of refugees applied in the region.

Yet criticism on this decision came from many experts, NGOs and communities of refugees that saw a political bias in Brazil’s government towards President Maduro’s regime. The decision applied to Venezuelans could potentially be applied to refugees from other nationalities, but few think it will be.

14.11 The Inter-American Human Rights System and the Cartagena Regime

The Inter-American Human Rights System (IAHRS) is comprised of three bodies: the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (I/A Court H.R.) and the Inter-American Institute of Human Rights (IAIHR) (OAS, 2020). The first is legally binding for all 34 Organization of America States (OAS) members, while the second is binding only for those recognizing

its jurisdiction – that means 20 states (including all Mercosur members, excepting Venezuela, and the other South American countries – Bolivia, Chile, Colombia, Ecuador and Peru).

The IAHRs has also played an important role in migration and human rights in cases regarding arbitrary detention of migrants, violation of nationality of migrants, extradition, deportation and expulsion of migrants, among others. Due to the fact that almost all South American countries recognize the I/A Court H.R., its subsidiary role in connection to the Cartagena Regime also empowers the intersection between migration and human rights in those countries. The I/A Court H.R. Advisory Opinion OC-21/14 on “Rights and guarantees of children in the context of migration and/or in need of international protection” (I/A Court H.R., 2014) is an important example of that.

14.12 Conclusions

The Cartagena Regime has contributed to a comprehensive response to forced migration challenges in Latin America in line with the GCR. In South America, the 2004 Mexico Declaration concepts of solidarity borders, solidarity cities and solidarity resettlement have been applied. Complementary protection in the form of humanitarian visas and qualifications have been also applied in South America with relative success in cases in which the RSD did not recognize forced migrants, although there have been limits to their implementation. New right- and far-right wing governments have contributed to regressive policies regarding migration and a human rights-based approach. The Covid-19 pandemic has affected the regular status of open borders and the normalcy of migration law regulations.

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15. Admissibility, Border Procedures and Safe Country Notions

Jens Vedsted-Hansen

15.1 The different meanings of 'safe country'

Although only mentioned in a couple of places in the New Pact on Migration and Asylum issued by the European Commission in September 2020 (European Commission, 2020a), the perception of certain countries as safe for asylum seekers and refugees seems to become increasingly important in EU asylum law and policy as the legislative proposals accompanying the EU Pact attribute significant weight to 'safe country' notions in various connections. From these texts it seems clear that the notion of safety will become ever more relevant in both of its traditional meanings: as a reference to the applicant's *country of origin* and as a term referring to non-EU countries through which the applicant has transited or previously stayed *en route* to the external border of the European Union.

The legal contents and implications of the 'safe country' notion differ quite significantly between the various legislative instruments, yet its cognitive aspects may appear to be far less different. In reality, the notion of safety is given meaning through its actual usage in specific procedural contexts that may well allude to similar preunderstanding of the notion. The following analysis shall illustrate this with a particular focus on border procedures and admissibility under the EU Pact and its legislative proposals.

The concept *safe country of origin* relates to the various procedural channels through which asylum applications are being examined on the merits. Historically, this aspect of the 'safe country' notion has been

linked to the special procedures for ‘manifestly unfounded applications’ or other types of accelerated asylum procedures. Such procedures were gradually introduced during the 1980s and 1990s, first with reference to the UNHCR Executive Committee (UNHCR, 1983) and later by the pre-Maastricht ‘London Resolution’ on Manifestly Unfounded Applications for Asylum (EC, 1992a) that linked the acceleration of examination procedures to the concept ‘safe country of origin’ through the accompanying Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (EC, 1992b). The past decades have added to the ‘safe country of origin’ standards as well as to the actual implementation of these standards.

As opposed to the substantive application of ‘safe countries of origin’, the concept *safe third country* has been increasingly used as an admissibility criterion. This was, and still is, the crucial requirement to be fulfilled in the implementation of pre-procedure returns of asylum seekers from Greek islands to Turkey under the EU-Turkey arrangement of March 2016 (European Council, 2016) that is often considered as a blueprint (Ineli-Ciger and Ulusoy, 2020) for the ‘protection elsewhere’ policies now underway as a more general and far-reaching element in the revised CEAS to follow from the EU Pact.

As yet another kind of ‘safe third country’ device employed among EU Member States, the principle of ‘mutual trust’ is being systematically used as a legal basis for presuming the safety of asylum seekers in other Member States, as reflected in the various CEAS instruments and operationalised in the Dublin Regulation (EU, 2013a). This intra-EU usage of the ‘safe country’ notion is not going to be discussed any further here.

15.2 Pre-entry screening at external borders: asylum procedure ‘light’?

An overall rationale of the New Pact on Migration and Asylum is the need to tackle the changing nature of the migration challenge that purportedly results from the tendency towards *mixed migration flows*. The EU Pact itself posits that mixed flows of refugees and migrants have meant ‘increased complexity and an intensified need for coordination and solidarity mechanisms’ (p. 3). The Commission elaborates on this in the Proposal for a Screening Regulation (European Commission,

2020b) by stating that available data demonstrate that the arrival of third-country nationals with clear international protection needs as observed in 2015-2016 has been 'partly replaced by mixed arrivals of persons'. It is therefore, in the Commission's view, important to develop a new effective process allowing for better management of mixed migration flows. In particular, it is 'important to create a tool allowing for the identification, at the earliest stage possible, of persons who are unlikely to receive protection in the EU' (p. 1).

The proposed Screening Regulation does not include any specific tool for that purpose, however. While the pre-entry screening aims to ensure swift handling of third-country nationals who request international protection at border crossing points (recital 7), it seems unclear whether and how the outcome of the screening will actually contribute to that aim. It therefore has to be analysed in connection with the other legislative proposals.

According to Article 14(2) of the Proposal, the authorities conducting the screening shall, in the de-briefing form provided for by the Regulation, point to 'any elements which seem at first sight to be relevant to refer the third-country nationals concerned into the accelerated examination procedure or the border procedure' stipulated by the Amended Proposal for an Asylum Procedure Regulation (European Commission, 2020c). In other words, 'swift handling' implies that the pre-entry screening will simply be aimed at identifying cases that can be referred to the accelerated or/and border procedures and hence be exempt from the ordinary asylum procedure. The latter is supposed to become accessible only for those applicants with well-founded claims, as explained in the EU Pact (p. 4).

Neither the proposed Screening Regulation nor the annexed standard de-briefing form specifies which types of information should be considered relevant 'at first sight' for referral into the various asylum procedures, nor is there any stipulation as to how such information is to be collected and verified. Against this background it is hard to avoid the impression that information may be sought, collected and reported during the pre-screening at external borders that will *de facto* become decisive to the examination of applicants' need for protection despite the absence of such legal clarity and procedural safeguards.

The mandatory elements of the proposed pre-screening will be health

and vulnerability check, identification, security check and registration of biometric data as well as filling out of a de-briefing form and 'referral to the appropriate procedure', i.e. return procedure, accelerated asylum procedure or border asylum procedure (Article 6(6), cf. Article 14). Accordingly, the standard de-briefing form will include information pertaining to irregular entry and itinerary such as countries and places of previous residence, third countries of transit, modalities of transit and assistance provided by facilitators in relation to irregular border crossing (Article 13 and Annex).

Some of this information may be indirectly relevant to the substantive examination of the applicants' need for protection and thus for channelling cases into accelerated procedures based on their assumed 'safe country of origin'. Nonetheless, it seems safe to assume that the pre-entry screening will primarily address issues and facts that may provide the basis for considering applications inadmissible on 'safe third country' grounds. If implemented in close connection with border procedures on asylum and return, as foreseen by the EU Pact (p. 4), the pre-entry screening seems likely to serve as a device for summary decisions concerning pre-examination return based on inadmissibility grounds as well as for the cursory examination and allocation of cases to normal or accelerated and/or border asylum procedures.

15.3 Inadmissibility on 'safe third country' grounds: second layer of border procedures?

While the proposed Screening Regulation can be considered as purely procedural and organisational, the 2016 Proposal for an Asylum Procedure Regulation (European Commission, 2016) and the Amended Proposal for an Asylum Procedure Regulation (European Commission, 2020c) launched with the EU Pact contain procedural standards based on criteria with a certain degree of substantive content. The operation of these criteria in the context of border control, however, will depend crucially on the organisational arrangements conditioning the implementation of the relevant procedures. There is ample evidence that CEAS standards do not in reality prevent Member States from acting at variance with EU law when exercising border control. Importantly, monitoring and enforcement by the Commission have so far proven insufficient to effectively prevent the infringements, as implicitly recognised by the Commission

itself in the 2015 European Agenda on Migration (European Commission, 2015: 12) and in the EU Pact (European Commission, 2020a: 6).

This is to be borne in mind when forecasting the effects on the ground of the procedural standards proposed along with the EU Pact. The border procedure that will be applicable for the examination of asylum applications as well as for carrying out return decisions according to the Asylum Procedure Regulation (Articles 41 and 41 a of the Amended Proposal) may give rise to particular concern in this regard.

One of the key devices in connection with the proposed border procedure is the return of asylum seekers on 'safe third country' or 'first country of asylum' grounds. Here we shall focus on the former notion that is likely to be the most relevant in practice and the most problematic in principle. While the border procedure as such will be optional for Member States in these cases, the application of the admissibility criteria will be mandatory under the proposed Asylum Procedure Regulation (Article 36). Notably, the requirements for declaring an application inadmissible without any examination of the need for protection are based on the more or less substantiated presumption that a given third country is 'safe' for asylum seekers and refugees.

The 2013 Asylum Procedures Directive (EU, 2013b) already lays down fairly modest criteria for applying the 'safe third country' notion, requiring that there is no risk of persecution or serious harm in, and no risk of indirect *refoulement* from, such a country. In addition, there must be the possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention (Article 38). The inadmissibility criteria in the Proposal for an Asylum Procedure Regulation (European Commission, 2016) are even weaker as the latter requirement will be modified to the effect that the possibility must exist to receive protection in accordance with the 'substantive standards' of the Refugee Convention or 'sufficient protection' (Article 45(1)). This apparent expansion of the inadmissibility grounds may extend the scope for political manoeuvre in situations where the solidity of the basis for assuming safety in a third country could be questioned. As is well known, this was indeed the case for returns to Turkey within the framework of the 2016 EU-Turkey arrangement (European Council, 2016). It is not hard to imagine future scenarios in which a flexible standard for assessing the 'sufficiency' of protection in a third country could be helpful for the

purpose of rejecting applications as inadmissible and returning asylum seekers to that country without examining their cases.

The effects of this inadmissibility ground will be crucially dependent on the actual possibility to rebut the presumption of safety and the assumed individual connection to the 'safe third country' in question. To the extent admissibility decisions are going to be made in a border procedure that is narrowly connected to, if not *de facto* coinciding with, pre-entry screening as discussed above, it may prove very difficult to uphold the procedural safeguards necessary to ensure effective access to rebuttal of the presumption of safety.

15.4 Safe countries of origin: distorting the perception of protection?

It is well established that the 'safe country of origin' notion cannot in and of itself justify the rejection of an asylum application. The only legally sustainable impact of the legal concept is that of creating a *presumption* that the applicant is not in need of international protection for the purpose of channelling the case to an accelerated examination procedure. Like any other presumption, this procedural one has to be *rebuttable*, and the possibility to rebut the presumption of safety in an applicant's country of origin must be real and effective. The possibility of rebuttal is clearly reflected in Article 36 of the 2013 Asylum Procedures Directive (EU, 2013b). Importantly, however, the effectiveness of the access to rebuttal is at risk of being reduced as a consequence of the pending legislative proposals.

Introduced back in 1992, as described above in section 1, the 'safe country of origin' notion has become a central part of the CEAS. In the Asylum Procedures Directive (EU, 2013b) it is one of the key grounds for accelerated examination that may take place at the border (Articles 31(8)(b) and 43). In addition, the EU Court of Justice (CJEU, 2013) has made it clear that this procedural criterion does not in itself constitute discrimination on grounds of applicants' nationality, provided that the accelerated procedure complies with the basic principles and guarantees set out in the Directive. Nonetheless, the legislative proposals accompanying the EU Pact will raise other and more severe fundamental rights concerns if adopted.

Already the initial Proposal for an Asylum Procedure Regulation (European Commission, 2016) contains a provision that will reintroduce the designation of ‘safe countries of origin’ at EU level by way of an EU common list of such countries, including Albania, Bosnia and Herzegovina, Northern Macedonia, Kosovo, Montenegro, Serbia and Turkey (Article 48 and Annex 1). While some of these countries may be rather uncontroversial in this regard, the latter appears highly disputable at least since the Turkish government’s reactions to the military *coup d’état* that was attempted just two days after the Proposal had been launched in July 2016. The Commission has apparently neither modified this part of the Proposal nor explicitly addressed the question of how it may still be considered compatible with EU fundamental rights.

Furthermore, the Amended Proposal for an Asylum Procedure Regulation (European Commission, 2020c) launched with the EU Pact will introduce an additional ground for accelerating the examination procedure: the applicant’s origin in a country for which the proportion of decisions by authorities granting international protection is 20% or lower, according to the latest available yearly average Eurostat data. Exceptions are foreseen for situations where a significant change has occurred in the third country concerned since the publication of the relevant data, or where the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs (Article 40(1)(i)).

Leaving aside the apparent contradiction inherent in this exception, which is quite hard to reconcile with the very idea of accelerated procedures, the need for such an acceleration ground is not evident, given the abovementioned grounds that are based on similar considerations. The Explanatory Memorandum presents this proposal as being based on ‘more objective and easy-to-use criteria’ and suggests that the percentage is justified by the significant increase in the number of applications made by applicants coming from countries with a low recognition rate and ‘hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded’ (European Commission, 2020c: 13-14).

Considering that the proposed acceleration ground, along with the pre-existing criteria, will be mandatory for the channelling of cases into an accelerated examination procedure, and that examination in the border

procedure of cases accelerated on this ground will become mandatory as well, the totality of the procedural proposals seems to have the rather clear cognitive implication that many asylum seekers neither deserve nor need to undergo substantive examination in normal asylum procedures with the full scope of guarantees. While such seem likely to become a privilege for only a limited number of asylum seekers, sizeable categories of people will be confronting strong presumptions against their need for protection that will, due to the procedural devices discussed above, become *de facto* very hard to challenge in the context of border procedures.

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16. Setting The Right Priorities: Is the New Pact on Migration and Asylum Addressing The Issue of Pushbacks at EU External Borders?

Marco Stefan and Roberto Cortinovis

16.1 Introduction

The notion of ‘pushback’ describes practices of refusal of entry at the border as well as expulsions of individuals from a state territory without an assessment of their personal protection needs and with disregard for basic procedural guarantees. The term also encompasses hostile and violent actions by states’ authorities against individuals that are often associated with those practices.

Pushback practices represent a major threat to the fundamental rights and rule of law standards established under EU primary and secondary legislation, most notably the prohibition of *refoulement* and the right to seek asylum (Parliamentary Assembly of the Council of Europe, 2019). They also stand at odds with the EU Member States’ obligation to uphold the international legal framework of refugees and migrants’ protection. The commitment to comply with this framework has recently been reaffirmed in both the UN Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM).¹

Pushbacks have been reported at several sections of the EU external

1 See Global Compact on Refugees, United Nations, New York, 2018 (<https://www.unhcr.org/5c658aed4.pdf>); Global Compact for Safe, Orderly and Regular Migration, December 2018 (https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195).

borders, including along the Western Balkans Route, as well as in the Western, Central and Eastern Mediterranean (European Union Agency for Fundamental Rights, 2020a; Parliamentary Assembly of the Council of Europe, 2019; Refugee Rights Europe and End Pushbacks Partnership, 2020). This contribution pays specific attention to the situation at the Greek-Turkish land and sea borders. Greek authorities' systematic use of violence toward migrants and asylum seekers at the Evros River has been widely documented over many years (Pro Asyl, 2013). However, worrying reports of such practices have drastically multiplied over 2020 (Wemove Europe and Oxfam International, 2020). Extensive accounts also exist of pushbacks at sea by the Greek Coast Guard (Kingsley and Shoumali, 2020).

Increasing evidence of the European Border and Coast Guards (Frontex) active involvement in and connivance with these kind operations have recently induced the European Commission to request the agency to investigate existing allegations of pushbacks and address persisting accountability gaps for fundamental rights violations in the Aegean Sea (Nielsen, 2020; Adkins, 2020).

Taking the steps from this backdrop, this contribution interrogates whether and how the Commission's New EU Pact on Migration and Asylum (European Commission, 2020a) envisages the adoption of legal, procedural and operational responses that are required to address the increased use of pushback practices at EU external borders.

Special focus is paid to the Pact's proposal to establish an independent fundamental rights monitoring mechanism in pre-border screening procedures. We evaluate the potential of such a mechanism to prevent deviations from the *non-refoulement* principle, but also to redress the serious accountability challenges traditionally associated with pushbacks.

16.2 International, regional and EU fundamental rights standards

A state's obligation not to expel or return a person to territories where his/her life or freedom would be threatened (*non-refoulement*) is the cornerstone of the international protection regime. It is set out in Article 33.1 of the 1951 Refugee Convention, as well as in other UN Human Rights Conventions (e.g. in Article 3 of the Convention Against Torture).

The *non-refoulement* principle is also a key tenet of the system established under the European Convention on Human Rights (ECHR). Article 2 (right to life) and Article 3 (prohibition of torture, inhuman and degrading treatment or punishment) prohibit any return of an individual who would face a risk of a treatment contrary to those provisions. The obligation of *non-refoulement* under the ECHR is absolute: it does not allow for derogation, exception or limitation, even in situations of mass arrival of migrants at borders (Hruschka, 2020) or in the context of a health emergency such as the Covid-19 pandemic (Nicolosi, 2020).

Article 4 of Protocol 4 to the ECHR specifically prohibits the collective expulsion of aliens. Such prohibition constitutes a corollary of the *non-refoulement* principle as it grants every individual the possibility to assert the existence of a risk of treatment incompatible with the Convention in case of expulsion from a state's territory. The prohibition of collective expulsions is also a rule of international and regional human rights law stemming from the right to a fair trial: it implies the right to an individualized procedure taking into account the personal situation of any person subject to expulsion, regardless of the legal or administrative status of the latter (Carrera, 2020).

Prohibition of refoulement and summary expulsions are included in EU primary law, specifically in Articles 18 and 19 of the EU Charter of Fundamental Rights. In addition, pushbacks are often associated with excessive use of force that may as well result in violations of the right to integrity and the protection from ill treatment (Articles 3 and 4 of the EU Charter). In extreme circumstances, violent actions might even lead to a breach of the right to life (Article 2) (European Union Agency for Fundamental Rights, 2020b).

Non-refoulement obligations are also incorporated in the key legislative instruments of the Union's asylum and border management *acquis*. The EU Asylum Procedures directive provides that whenever an application for international protection is made (including at the border) access to an asylum procedure is to be granted (Article 6), and that applicants should have access to an effective remedy with suspensive effect against a decision rejecting their protection claims (Article 46).² The Schengen

2 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29.6.2013.

Border Code states that border control should be carried out without prejudice to the rights of refugees and third country nationals requesting international protection (Article 3).³ The EU Return Directive requires Member States to take into account the *non-refoulement* principle throughout all the different stages of the return procedure.⁴ Legislation laying down the Frontex mandate imposes respect of the *non-refoulement* principle in all agency activities, including in the context of border surveillance operations at sea.⁵

16.3 Fundamental rights monitoring under the new Pact

Allegations of pushbacks at the Greek-Turkish borders over 2020 have been accompanied by strong reactions by the European Parliament LIBE Committee (European Parliament, 2020) and civil society organizations (Wemove Europe and Oxfam International, 2020). Calls for the Commission to investigate allegations of illegal pushbacks by Greek authorities, – and eventually to launch an infringement procedure against Greece – have remained unanswered.

Proposals allegedly directed at addressing the potential breach of fundamental rights in the treatment of people seeking asylum at Europe's borders have instead been tabled by the Commission on the occasion of the publication of the New Pact on Migration and Asylum.

The proposal for a Regulation establishing a pre-entry screening aims at introducing uniform rules concerning the identification, registration and fingerprinting of migrants and asylum seekers and for conducting

3 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77/1 23.3.2016.

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

5 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, 14.11.2019; Regulation (EU) No 656/2014 of the European Parliament and of The Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational co-operation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27.6.2014.

security and health checks at the EU external borders.⁶ The proposal also aims at establishing a tool for channelling individuals to the following procedure: return – or in case of application for international protection – normal, accelerated or asylum border procedure.

Article 7 of the proposed regulation envisages the creation of a new “Independent Mechanism for monitoring fundamental rights” which aims at ensuring compliance with EU and international law during the pre-entry screening process. The mechanism should ensure in particular that national rules on detention (including its grounds and duration) are respected during such process. It should also ensure that fundamental rights violations related to access to the asylum procedure and non-compliance with the *non-refoulement* principle – which indeed might well occur during the pre-entry screening – are dealt with promptly and effectively.

And yet, the proposal limits the monitoring mechanism to the pre-entry screening process only. This implies that the mechanism would not apply to the fundamental rights-sensitive border procedures following the pre-entry screening.⁷ Furthermore, and perhaps even more critically, the mechanism would not cover the whole range of border surveillance operations and border management activities that are performed by Member States (and the EU Frontex agency) before the activation of the screening procedures.

This limited scope casts doubt on the effectiveness of the proposed monitoring mechanism in properly addressing the fundamental rights and rule of law challenges linked to pushback practices. As underlined by the Greek case, such practices are characterized by a high level of informality: they are designed to escape public scrutiny and performed in remote areas which are often not accessible to independent monitors.

To effectively prevent abuses and increase accountability of national and EU border and coast guards, the mechanism should ensure that all border surveillance operations and border management activities at the

6 Proposal for a regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final.

7 See Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final.

EU external (sea and land) border are actually monitored. Ensuring that independent human rights monitors oversee the work of the authorities responsible for controlling, surveilling, and patrolling the EU external borders is crucial in this respect. These independent monitors should be given the authority (and necessary human and financial resources) to initiate and carry out autonomous and thorough investigations over alleged pushbacks, collective expulsions and related abuses. Similar monitoring mechanisms are already deployed in the field of forced returns (European Union Agency for Fundamental Rights, 2019).

Another key issue of concern is the potential role of the mechanism in handling complaints and providing access to justice to individuals who have had their fundamental rights (including access to asylum) violated at the border. As underlined by regional and international human rights bodies, a complaint mechanism can only be effective if it is in line with substantial and procedural standards of independence from state authorities. It also needs to be accessible in practice, and secure prompt and thorough follow-up procedures (Carrera and Stefan, 2020).

The Commission's proposal for pre-entry screening regulation assigns a specific role to the EU Agency for Fundamental Rights (FRA) to provide guidance to Member States in ensuring the independence of the mechanism, as well as in providing a monitoring methodology and appropriate training schemes. In the explanatory memorandum to the proposal, the Commission also added that the mechanism should ensure that "complaints are dealt with expeditiously and in an appropriate way".

The proposed legislation, however, does not specify the degree of independence that the envisaged monitoring mechanism should have from the authorities subject to the monitoring. The large margin of discretion left to Member States becomes especially problematic in contexts such as the Greek one, where institutional representatives (even at the higher level) systematically reject to acknowledge responsibilities of national authorities involved in push backs (Greek City Times, 2020).

16.4 Ensuring effective enforcement of fundamental rights at EU external borders: the role of “accountability actors”

The fundamental rights monitoring mechanism proposed in the Pact should enable the work of the accountability actors which, at different levels, are responsible for ensuring respect of fundamental rights and for activating and delivering effective remedies within the EU legal and institutional system. These include judicial authorities, EU institutions and agencies and, crucially, independent NGOs promoting and protecting human rights of migrants and refugees.

16.4.1 Accountability gaps at the national level: the role of judicial actors

Within the EU legal framework, EU Member States courts and judges can be considered to all effects as ‘EU courts’ which act as rule of law guarantors and implementers of rights under EU law, including in the area of border management, asylum, and returns (Cornelisse et al., 2020).

Judicial actions over repeated allegations of systematic violence against migrants and refugees have indeed been launched in Greece (Statewatch, 2019). So far, however, these procedures have not produced any tangible results, confirming the legal and operational challenges related to the activation of judicial proceedings over pushback cases (Carrera and Stefan, 2020). This circumstance should be read in conjunction with the lack of effective administrative remedies in the country, which has also been underlined by the UN Committee Against Torture (CAT, 2019).

In cases where evidence of pushbacks is brought before them, national judicial authorities have an obligation to investigate related fundamental rights violations, identify responsible actors and deliver redress to victims. Recent judicial developments in different EU Member States including for instance Italy (Bathke, 2020) and Slovenia (Bozic, 2020) highlight how judicial actors can and should assess responsibilities and deliver both criminal and civil justice remedies to third country nationals affected by pushbacks.

The establishment of a fundamental monitoring mechanism under the new Screening Regulation should not be considered a substitute for

the judicial oversight that must be made available at the domestic level. Instead, if truly independent and endowed with the necessary resources, the new mechanism could support the work of judicial authorities and increase their capacity to investigate pushback allegations. This could facilitate the collection of evidence needed to identify responsible actors, an issue that has so far made it particularly difficult for affected individuals to initiate judicial proceedings before national courts.

16.4.2 Frontex's fundamental rights responsibilities

Along the years, Frontex has acquired an increasingly relevant role in supporting national authorities in the management of EU's external borders. In Greece, Frontex is currently involved in almost every aspect of border management, as testified by the EU Action Plan to support Greece in managing its external borders with Turkey of March 2020 (European Commission, 2020b). The agency's involvement puts border and return operations in Greece under a formal EU "umbrella". This has important fundamental rights implications: as an EU agency acting within the scope of EU law, Frontex has a positive obligation to prevent abuses and secure respect of EU primary and secondary law *acquis* (Fink, 2020).

In spite of the fundamental rights responsibilities established in its recently amended founding regulation,⁸ Frontex has repeatedly refused to admit (let alone investigate) occurrence of pushbacks in Greece. The agency claimed instead that Greek authorities should be considered as solely responsible for any violation, because alleged episodes are happening outside the operational area covered by the Agency's operations.⁹ This claim is based on a minimalist interpretation of Frontex human rights responsibilities, which does not reflect the substantial role the agency plays in Greece. Such position has become increasingly untenable considering mounting evidence of the direct involvement of Frontex-coordinated vessels in pushback operations in the Aegean Sea (Waters et al., 2020). Evidence of Frontex-deployed officers' involvement

8 In this regard, see Articles 1, 5, 7, 10.1(e) and (ad), as well as Articles 31.3(e) and (f), 38.4, and Articles 43, 44, 46 and 47, of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

9 Such claims were made public by Frontex Executive Director, Mr. Fabrice Leggeri, during the European Parliament LIBE Committee Meeting that took place on July 6 2020 (https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200706-1645-COMMITTEE-LIBE_vd).

in pushbacks has been collected also in the Evros region (Karamanidou and Kasperek, 2020a).

After requests for clarifications from the European Parliament¹⁰ and, subsequently, the European Commission,¹¹ the Management Board of the agency held an extraordinary meeting on 10 November 2020 to discuss the issue of pushbacks. The Meeting Conclusions confirmed the need to take urgent action to investigate ‘all aspects related to the matter’, and called upon the agency’s Executive Director to ensure a ‘solid’ mechanism for internal reporting and prompt follow-up of reported incidents. They also envisaged the establishment of a ‘sub-group’ within the Management board (European Commission, 2020c).

The specific mandate of the sub-group is expected to be defined in a following meeting of the Management Board. However, it is already clear that the creation of such a new body will not in itself address the structural shortcomings characterizing Frontex’s accountability framework. There are no indications related to the independence and impartiality of the sub-group, which remains purely internal and Member State driven. Furthermore, it appears that rather than focusing on the investigation of pushback allegations and incident reports, the sub-group will be tasked with ‘the interpretation of EU regulations’ provisions related to operational activities at sea, and will be responsible for addressing ‘the concerns raised by Member States about “hybrid threats” affecting their national security at external borders’.

Legislative reforms of the agency over the previous years have not yet resolved the persisting deficiencies of the Frontex complaint mechanism, nor enhanced the role of the Agency’s Fundamental Rights Officer, which still fall short of existing standards of independence, accessibility and thoroughness of follow-up procedures. A generalized lack of transpar-

10 The European Parliament’s request for clarifications have been formulated through a series of written question included in a letter sent on 9 July 2020 by Fernando López Aguilar, Chair of the European Parliament LIBE Committee, and addressed to Frontex Executive Director, Mr. Fabrice Leggeri. Mr. Leggeri replied to the letter with a letter drafted on 24 July 2020. See (www.bellingcat.com/app/uploads/2020/10/FOI-1-20200724_ED-reply-to-LIBE-Chairman.pdf).

11 An official request to convene an urgent meeting of Frontex Management Board was made on 28 October 2020 by the EU Commissioner for Home Affairs Ylva Johansson. See, Borrás, M. (2020), “Commission calls for meeting with Frontex over alleged ‘push-back incidents’”, Euractiv, 29 October (<https://www.euractiv.com/section/justice-home-affairs/news/commission-calls-for-meeting-with-frontex-over-alleged-push-back-incidents/>).

ency concerning the specific roles and responsibilities of different actors involved in Frontex operations (compounded by a lack of public access to key operational documents) add to the structural accountability gaps mentioned above (Karamanidou and Kasperek, 2020b).

Legislative proposals under discussion at the EU level should be directed at addressing the shortcomings characterizing Frontex's fundamental rights accountability. Provided it is properly designed and entrusted with the task of overseeing the entirety of activities falling under Frontex's operational and coordination responsibilities, the envisaged independent monitoring mechanism could help address the serious accountability challenges identified above.

16.4.3 The role of independent NGOs

While reluctant to investigate responsibilities linked to violent pushbacks, Greek authorities have increasingly criminalized civil society actors supporting migrants and refugees, including NGOs involved in Search and Rescue (SAR) operations at sea (Vosyliūtė and Conte, 2019). While in itself a violation of regional and EU standards related to freedoms of expression and association, reprisals and retaliation against NGOs involved in SAR and other humanitarian activities also prevent these actors from contributing to independent monitoring of human rights abuses.

Independent NGOs can and should play a key role in the monitoring of fundamental rights at the EU borders. In its 2013 Decision on its own-initiative inquiry concerning Frontex, the European Ombudsman recommended making the Frontex complaint mechanism available to all stakeholders with a legitimate interest in activating the procedure, including independent NGOs. The active involvement of independent NGOs in the monitoring process and the possibility for these organizations to submit public interest complaints would substantially increase the impartiality and effectiveness of the proposed monitoring mechanism.

16.5 Conclusions

Ongoing discussions concerning the scope and functions of the monitoring mechanism envisaged by the Pact should take seriously the

alarming reports of fundamental rights violations coming from the Greek-Turkish borders (as well as from other areas of EU external borders).

Pushbacks are simply incompatible with a fundamental rights and rule of law-based approach to migration and asylum in Europe. They also stand at odds with the commitment to uphold the normative foundations of the international refugee protection regime included in the UN Global Compact on Refugees. An express commitment towards safe and dignified return of third country nationals has also been undertaken in the UN Global Compact on Migration, where reference is made to the importance of respecting the prohibition of collective expulsions – in particular by guaranteeing an individual assessment and the exhaustion of legal remedies against return decisions – as well to the need to uphold the independence of monitoring mechanisms to ensure accountability of return operations.

The establishment of a new fundamental rights monitoring mechanism at the EU borders may contribute to address the challenges mentioned in this contribution. To effectively address existing accountability gaps, however, it is crucial to align the proposed instrument with internationally recognized standards of independence and adequate follow-up to identified violations.

The mechanism should complement the role of existing accountability actors and instruments within the EU legal system. Investigations over violent pushbacks need to be conducted systematically by national judicial authorities. This is crucial to secure effective judicial protection and deliver effective remedies, in line with EU law. Preserving the operational space of independent NGOs is also key to ensuring independent monitoring and accountability of border and immigration enforcement authorities.

Finally, the Commission as “Guardian of the Treaty” as well as EU agencies (notably Frontex) should take much more resolute action to address fundamental rights violations associated with pushbacks, in line with the means and procedures that are available under their mandates.

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17. The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' For Migration Management

Giuseppe Campesi

17.1 Introduction

One of the most qualifying aspects of the new EU Pact on Migration and Asylum (European Commission, 2020a) published on 23 September 2020 are the proposals that the Commission has put forward to establish a 'robust and fair management of external borders', which find expression in the proposals for a Regulation on screening at the external borders (European Commission, 2020b) and in the amended proposal for an Asylum Procedure Regulation (European Commission, 2020c)

The Commission's stated aim is to build a system for the 'better management of mixed migration flows', establishing a 'seamless link between all stages of the migration process, from arrival to processing of requests for international protection until, where applicable, return' (European Commission, 2020b: 4). According to the envisaged plan, migrants will be registered and screened at the border to establish identity and health and security risks and then be referred to the appropriate procedure, be it asylum, refusal of entry or return. In particular, screening procedures will help relevant authorities to decide whether an asylum application should be assessed without authorising the applicant's entry into the Member State's territory in an 'asylum border procedure' or in a normal asylum procedure. Where an asylum border procedure is used and determines that the individual is not in need of protection, an accelerated 'return border procedure' should follow.

While it is specified (European Commission, 2020c: 4) that none of the proposals 'abridge the exercise of individual rights' and that asylum and return border procedures will be surrounded by 'adequate procedural safeguards' ensuring access to protection for those in need, the Commission's proposals risk institutionalising an asylum and return subsystem where migrants' rights will be protected by sub-standard legal and procedural guarantees. Overall, the focus seems to be placed more on the control of undesired migration and on the prevention of unauthorized secondary movements within the EU space, than on improving reception conditions and access to effective protection for incoming refugees.

In this contribution, I will assess the Commission's proposals on the new mechanism for the management of external borders in light of the experience and lessons learned from the implementation of the so-called 'hotspot approach' in Greece and Italy (European Union Fundamental Rights Agency, 2016).

17.2 Old wine in a new bottle?

The Commission's proposals are not an absolute novelty. They take up and systematize ideas that had already emerged in 2018 and which actually aimed at normalizing the hotspot approach (Campesi, 2020), transforming it into an ordinary tool for the management of incoming migration by sea. The proposal for a reinforced asylum border procedure was already included in the 2016 proposal for a new regulation of asylum procedures (European Commission, 2016), while the idea of an accelerated border return procedure had surfaced in the controversial 2018 non-paper on 'controlled centres' (European Commission, 2018a) and was then included in the proposal for a recast return directive published the same year (European Commission, 2018b). The Commission now brings together the rules on the asylum and return border procedures in a single legislative instrument, with the stated aim of closing the gap between the two stages of migration management and eliminating the risks of migrants' unauthorised movements within the EU space (European Commission, 2020a).

Unlike the hotspot approach, the new mechanism for the management of external borders is however envisaged as no longer circumscribed to cases of disproportionate migratory pressure and as limited to assisting frontline member countries in screening, debriefing and

fingerprinting incoming migrants by sea, but to effectively implement pre-entry screening and border procedures even outside 'crisis' situations. In particular, it would concern all third country nationals crossing external borders outside of the border crossing points, or disembarked after a search and rescue operation, and all third country nationals presenting themselves at border crossing points without fulfilling the entry conditions who apply there for international protection.

Another important novelty is that the new mechanism for the management of external borders will also apply to all third country nationals apprehended within the territory of Member States, where there are indications that they eluded border checks at the external border on entry. This means that they will be subjected to pre-border screening and the subsequent border procedures as if they had never physically entered EU territory.

One of the most worrying aspects is that the envisaged mechanism for the management of external borders relies heavily and explicitly on the protracted confinement of migrants and asylum seekers in border areas. In particular, the proposals put forward by the Commission seem to encourage member countries to multiply the sites of border enforcement, transforming EU borders into a space in which 'anomalous zones' will proliferate.

Gerald Neuman, who first used this concept in reference to the establishment of the refugee transit centre in Guantanamo, defines 'anomalous zones' as 'a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended' (Neuman, 1996: 1201). Over the years, the practice of strategically manipulating the geographical scope of jurisdiction by creating areas where migrants' access to rights and procedural safeguards were limited has been a hallmark of migration control policies implemented by main destination countries (Mountz, 2011). While the idea of establishing extraterritorial processing centres has been occasionally advanced (Noll, 2003), such an approach has never been officially pursued at the EU level.

The new EU Pact on Migration and Asylum does not represent an explicit move in that direction, since it does not envisage the establishment of processing centres in third countries; yet it often alludes to the extraterritoriality of the areas or facilities where screening and border

procedures will be carried out. In what follows I will outline the potential implications of these references to the extraterritoriality of the new mechanism for the management of external borders.

17.3 The spatiality of the new mechanism for the management of external borders

One point on which the Commission places great emphasis is that during the new screening procedure third-country nationals concerned should not be authorised to enter the territory of Member States (see Article 4(1) of the proposal in European Commission, 2020b). In particular, Member States are explicitly called upon to adopt measures to prevent the persons concerned from leaving the 'locations situated at or in proximity to the external borders' (see Article 6(1) of the proposal in European Commission, 2020b) where the relevant procedures are carried out.

Such measures may 'in individual cases' include detention, but the Commission seems to suggest that this should not be the rule, apparently leaving Member States free to determine the appropriate locations to carry out pre-entry screening procedures 'taking into account geography and existing infrastructures'. It is only suggested that the tasks related to the screening may be carried out in already established hotspot areas (see Recital 12 of the proposal in European Commission, 2020b). This reference to the hotspot approach is however particularly worrying here, as the experience of the past five years has clearly shown that hotspot areas were in fact managed as places of confinement, in which migrants' freedoms were drastically curtailed even in the absence of formally adopted detention measures (European Union Fundamental Rights Agency, 2016).

Commissioner Johansson has argued before the LIBE Committee of the European Parliament that with the new pre-entry screening procedures the Commission is not intending to promote detention¹, yet it is easy to imagine that in order to prevent migrants from escaping the new mechanism for the management of external borders, Member States will be tempted to adopt automatic and generalized detention measures, or at least strongly encouraged to carry out pre-entry screening and border

1 See record of the September 24th, 2020 session available at: https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20200924-0900-COMMITTEE-LIBE-B_vd

procedures in locations where, if not formally detained, migrants will actually be confined to islands or other geographically inaccessible areas.

Similarly, asylum seekers subject to border procedures shall not be authorized to enter Member States' territory and, according to the Commission's plans (European Commission, 2020c), must be accommodated in dedicated 'facilities' set up in proximity to the sections of the external border or border crossing points where Member States expect to receive most asylum applications falling within the scope of the border procedures. The Commission does not explicitly mention detention, but it is clear that the emphasis placed on the need to prevent entry will induce Member States to confine all asylum seekers subjected to border procedures in the same locations where pre-entry screening takes place. This was for instance the approach followed by Greece in the implementation of the hotspot approach, with every migrant reaching a Greek island from Turkey subjected to a geographical restriction and prevented from moving to the mainland pending the definition of his/her position according to the asylum border procedure enacted with Law 4375/2016 (Bousiou, 2020).

Finally, migrants subject to a border return procedure may be held in detention 'in order to prevent unauthorised entry and carry out return' for the duration of the procedure, which would last a maximum of 12 weeks. This should be added to the 12 weeks during which the migrant has been placed under the asylum border procedure, which means that the new mechanism for the management of external borders gives Member States the power to curtail migrants' personal freedoms for a total of six months. The proposal does not specify where migrants subject to border return procedures should be held in detention. Yet the Commission is arguably inspired by the Greek example, where migrants were prevented from reaching the mainland and repatriations under the EU-Turkey statement were carried out directly from hotspot areas (Illias et al., 2019).

Less clear is where screening procedures should take place in cases of third country nationals apprehended within the territory of Member States. Article 6(2) of the Commission's proposal on the screening of third country nationals at the external borders (European Commission, 2020b) simply says that in these cases 'the screening shall be conducted at any appropriate location within the territory of a Member State.' This means that Member States will have room to implement this provision

differently, possibly also using ordinary pre-removal detention facilities to that end. Yet the Italian case may be taken as an example of the implications that this provision can have – in particular when implemented by frontline member countries.

Following the enactment of Decree No. 17/2017, the Italian police have been vested with the power of returning irregular migrants intercepted on Italy's mainland to hotspot areas, thus giving a legal basis to the practice of forcibly dispersing migrants gathering near main border crossing points in an attempt to reach Switzerland, France or Austria (Tazzioli, 2018). In spite of the Commission suggesting that 'submitting the same third-country national to repeated screenings should be avoided to the utmost extent possible' (Recital n. 19 of the proposal in European Commission, 2020b), the idea of submitting third country nationals apprehended within the territory of Member States to pre-entry screening is likely to encourage dispersal practices. The legal fiction of EU borders will be literally haunting migrants within Member States' mainland areas by giving state authorities more room to curtail their personal freedoms and limiting access to ordinary asylum and return procedures.

17.4 The new legal geography of EU borders

The envisaged mechanism for the management of external borders is premised on the idea that 'abusive' asylum requests should be dealt with quickly by keeping migrants at the border and returning them as soon as possible. This idea is highly questionable because border procedures always increase the risk of arbitrariness and discrimination (ECRE, 2019), but it is also deeply flawed as it rests on the assumption that member countries will be able to quickly and effectively enforce returns. According to the Commission's plans, when it is 'from the outset' clear that readmission of rejected asylum seekers would be impossible, Member States 'may decide' not to apply border procedures (European Commission, 2020c). Yet, given that the main objective of the proposed mechanism for the management of external borders is to prevent unauthorized entry, it is likely that the effect produced will be that of immobilizing asylum seekers in proximity of border areas, increasing as a consequence the pressure on the reception infrastructures of frontline member countries.

Similar logic was already at work in the implementation of the hotspot approach. While the Commission never went so far as to classify hotspot areas as extraterritorial sites, the result of the hotspot approach was to encourage frontline countries to confine migrants to border areas, in many cases on islands or in otherwise remote and poorly accessible locations, such as transit zones. In the wake of the current pandemic, Italy has even experimented with the practice of confining incoming migrants into 'quarantine ships' (ANSA, 2020), which may be seen as a first experiment with the idea that was advanced in 2016 of establishing floating offshore processing facilities (Nielsen, 2016).

The EU pact seems to go a step further in the legal manipulation of EU border geography, describing the 'locations' where the new mechanism for the management of external borders will be implemented as outside EU territory. The legal implications of this attempt at de-territorializing EU borders are obviously highly questionable, given it is doubtful that Member States may escape their obligations on human rights and refugee protection by simply reframing territory as non-territory (Gammeltoft-Hansen, 2014). On the contrary, as it has been suggested (Carrera and Stefan, 2020), the rule of law follows the state wherever it exercises jurisdiction over individuals.

The Commission seems to want to mitigate the fundamental rights challenges raised by the proposed new mechanism for the management of external borders by envisaging the establishment of a monitoring mechanism for pre-entry screening procedures (see Article 7 of the proposal in European Commission, 2020b). However, besides the structural limits already highlighted by Stefan and Cortinovis in their contribution to this book (Chapter 16), one has to ask whether the envisaged monitoring mechanism will be able to effectively address the risk of human rights violations deriving from an approach which is premised on the idea of confining asylum seekers at the border.

As the experience of the implementation of the hotspot approach has demonstrated, Member States have managed hotspot areas as spaces of border enforcement where access to rights was mediated by distance creation. The relative remoteness of hotspot areas has greatly limited asylum seekers' access to information and support, keeping them in isolation from local communities and resources that are more readily available in the mainland. While, as suggested, it is doubtful that

the insistence on the extraterritoriality of the new envisaged pre-entry screening and border procedures may legitimize any local suspension of the rule of law, the risk is that this may further encourage the multiplication of remote places of confinement where asylum seekers' access to rights will be mediated only by state representatives.

The effective protection of human rights in the framework of the new mechanism for the management of external borders will depend on the degree of independence that the envisaged monitoring bodies will be able to maintain with respect to national governments. It will also rely on the prerogatives with which they will be vested. Experience with the implementation of the hotspot approach suggests that multiplying the anomalous zones of border enforcement where asylum seekers – in addition to being subjected to less guaranteed border procedures, will also be kept isolated from civil society and advocacy groups – greatly increases the risks that their access to rights is limited or their protection needs not properly considered.

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18. The New EU Pact on Migration and Asylum and the Rohingya Refugee Situation

M Sanjeeb Hossain¹

18.1 Introduction

On October 15, 2020, a press release issued by the EU Mission (2020) to ASEAN informed that there was a “a significant funding gap in the international response” to the Rohingya refugee situation this year and that the US, UK, EU and the United Nations High Commissioner for Refugees (UNHCR) was set to co-host an online donor conference to bridge this gap. The conference, marked by Myanmar’s absence, was held a week later on October 22, where donors pledged \$600 million to aid the Rohingyas (Besheer, 2020). It was at this conference Md Shahriar Alam (2020) the Bangladeshi State Minister for Foreign Affairs communicated that Bangladesh was no longer in a position to bear the burden placed by the refugee situation and that the Rohingyas would have to return to Myanmar at the earliest opportunity. On the evening of the donor conference, the Chinese Foreign Minister during a telephonic conversation with his counterpart in Bangladesh informed that a foreign minister-level tripartite meeting between Bangladesh, China and Myanmar would be held soon and that Myanmar had assured China it would take back the Rohingyas (New Age, 2020).

The new EU Pact on Migration and Asylum (EU Pact) “conditioned by the United Nations Global Compact on Refugees (UN GCR) and the EU Treaties” (Carrera, 2020; see Chapter 1) was proposed, in the words

1 I thank Maja Janmyr, Lewis Turner and Sergio Carrera for helpful comments while writing this Chapter.

of the European Commission (2020a), to build “a system that manages and normalises migration for the long term” and is “fully grounded in European values and international law”. This Chapter strives to shed some light on the EU’s potential role in the coming days in ending the Rohingya refugee situation with particular reference to EU Pact. It is written in light of two realities. First of all, the European Union (EU) has played a pivotal role in mobilizing funds to alleviate the plight of Rohingya refugees. And secondly, despite the humanitarian assistance, developmental and conflict prevention support extended by the EU (European Commission, 2020b), the Bangladesh Government instead of relying solely on the diplomatic assistance of the EU or utilizing UN-sponsored mechanisms, actively solicited the involvement and help of China to resolve the Rohingya refugee situation. It is worth recalling that China has in the past, refused to condemn Myanmar (Amnesty International, 2017) for its atrocities against the Rohingyas, and did not take part in the Rohingya Conference alongside Russia despite being invited (Al Jazeera, 2020a).

Bearing these realities in mind, this contribution briefly traces the historical evolution of the Rohingya refugee situation and Bangladesh’s engagement it. It then goes on to describe how the EU can take inspiration from its new Pact in the collective global pursuit of ending the Rohingya refugee situation. In many ways, this contribution consciously asks more questions than it answers because its purpose is to offer a new starting point for further debates on the EU’s role towards the Rohingya refugee situation.

18.2 In retrospect – the plight of the Rohingyas

In “one of the first major Western surveys of the languages of Burma” Francis Buchanan in 1799 noted the *Rooinga* as Mohammedan’s who had long settled in Arakan. Despite this and a range of sources documenting the presence of the Rohingyas dating back centuries,² they remain unrecognized as one of the 135 national ‘races’ living in Myanmar (Al Jazeera,

2 See, Mihir Shekhar Bhonsale, ‘Evolution of the Arakan ‘Problem’ in Burma’ [2015] 76 Proceedings of the Indian History Congress 631-636; Moshe Yegar, *The Muslims of Burma: a study of a minority group* (Schriftenreihe des Südasiens-Instituts der Universität Heidelberg 1972) and, Mohammad Shahabuddin, ‘Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis’ [2019] 9(2) Asian Journal of International Law, pp. 334-358.

2018). Excluded from the nation-building process since independence, the Rohingyas were rendered 'stateless' (Lewa, 2009) through the passage of the Citizenship Law of 1982. Over the years, an unholy combination of general racism and hostile Armed Forces has played a central role in stripping the rights of the Rohingyas in Myanmar. An array of accusations ranging from being "illegal Bengali immigrants" (Akins 2018) who settled in Myanmar during the period of British colonization to being "militants" (Ratcliffe 2017) have been put forth to justify the continued persecution of the Rohingyas for decades. This is why, on the morning of December 05, 2017, when Pramila Patten, the United Nations Special Representative on Sexual Violence in Conflict described the Rohingya's of Myanmar as the "most persecuted minority in the world" (OHCHR, 2017), none of the remaining attendees of the Special Session of the Human Rights Council perceived her categorization as hyperbole.

To survive the onslaught of the Myanmar Army, the Rohingyas fled to neighboring Bangladesh in 'waves'. The earliest waves were recorded in 1948 when Myanmar became an independent State, followed by two more in the late 1970s and the early 1990s. The most recent wave began in August 2017 after a ruthless crackdown by Myanmar's Army. As of today, roughly one million Rohingyas are residing in 34 refugee camps located at the southern tip of Bangladesh at a place known as Cox's Bazar.

Bangladesh has a long history of collaborating with the EU, UNHCR, International Organization for Migration (IOM), as well as other charities and NGOs, in assisting the Rohingyas inside these camps. Interestingly, a substantial amount of the efforts of the Bangladesh Government, UNHCR and other partners target the 'visible' Rohingyas, i.e. the ones who are officially registered 'Forcibly Displaced Myanmar Nationals' or given 'refugee' status. They form only a part of the overall refugee situation, and the attention they receive casts a dark shadow on the plight of Rohingyas who over the years have fled across the border and integrated themselves within the local communities because the Bangladesh Government, concerned that assisting unregistered refugees would create a 'pull factor' (Danish Immigration Service, 2011), chose not to recognize them. Living outside formal camps, several hundred thousand 'invisible' or unregistered Rohingyas live in dire conditions devoid of formal access to food, shelter or work permits.³

3 Sabyasachi Basu Ray Chaudhury and Ranbir Samaddar, 'Introduction' in Sabyasachi Basu Ray Chaudhury and Ranbir Samaddar (eds) *The Rohingya in South Asia: People Without a State* (Routledge 2018), pp. 4.

Although Bangladesh is not a State Party to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol and does not have any national laws addressing asylum and refugee matters, it is not entirely devoid of a framework geared towards protecting refugees.⁴ Much has changed since Pia Prytz Phiri (2008) described the administrative decisions taken by Bangladeshi authorities to protect and support the Rohingyas as “ad hoc, arbitrary and discretionary”. There is scope to argue that many of the Rohingya refugees do not “feel like deer caught between two tigers” as was once portrayed by Eileen Pittaway.⁵

In recent times, Bangladesh has received praise for keeping her borders open to the fleeing Rohingyas and actively striving to meet their humanitarian needs. In 2017, the High Court Division of the Supreme Court of Bangladesh held that the 1951 Refugee Convention had “become a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not.” In the absence of any constitutional provision clearly depicting the status of ‘customary international law’ in the legal order of Bangladesh, it remains a generally accepted principle that customary international law is binding as long as it does not contradict domestic law.⁶ Earlier this year, the Bangladesh Government’s decision to grant Rohingya children the access to education was widely lauded (Ahmed, 2020).

Unfortunately, this does not negate the reality that there remain many gaps in the refugee protection regime. Instead of focusing on protecting and enhancing their rights, the discussion and discourse around the Rohingya refugee situation are leaning towards overcoming the challenge of how to return them to Myanmar. A Memorandum of Understanding (MoU) was signed between Bangladesh and Myanmar in November 2017 for the purposes of repatriating the Rohingyas (VOA News, 2017) who

4 The Foreigners Act 1946 remains one of the key pieces of legislation shaping the status of refugees in Bangladesh.

5 Eileen Pittaway, ‘The Rohingya Refugees in Bangladesh: A Failure of the International protection Regime’ in Howard Adelman (ed) *Protracted Displacement in Asia: No Place to Call Home* (Routledge 2008), pp. 83.

6 Bianca Karim and Tirza Theunissen, ‘Bangladesh’ in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2012), pp. 8.

fled from the atrocities of the Myanmar Army.⁷ The European Parliament (2017), at the time, insisted on the “direct implementation of the MoU and for the right of the Rohingya to voluntary, safe and dignified return to their places of origin [...]” and expressed a note alarm that the Rohingyas may “not be repatriated back to their villages, but to refugee/prison camps in Myanmar”.

Another MoU between Myanmar and UN Agencies was signed in June 2018 to allow for the UNDP and UNHCR to assist the Myanmar Government to implement the MoU between Bangladesh and Myanmar.⁸ In this MoU, the Myanmar Government agreed that it was “responsible for the safety, reception and reintegration of the returnees” and would “work for a comprehensive and durable solution to the displacement of persons in and from Rakhine State” in line with the recommendations of the Advisory Commission on Rakhine State (2017).

Following the recent remarks of Md Shahriar Alam and the assurances given by China, it appears that Sheikh Hasina, the Prime Minister of Bangladesh who once said “we have the ability to feed 160 million people of Bangladesh and we have enough food security to feed the 700,000 refugees” (Tribune Desk, 2017), is running out of patience. One wonders whether, on the not so distant horizon, the Rohingyas will be repatriated to Myanmar at the expense of non-refoulement, a principle Bangladesh has upheld so far.

In this context, the following section discusses how the EU drawing from its Pact on Migration and Asylum can positively shape the outcome of the Rohingya refugee situation.

7 The text of the MoU (Arrangement of Return of Displaced Persons from Rakhine State) could not be accessed at the time of drafting this contribution. However, it was possible to access the text of a subsequent arrangement titled ‘Physical Arrangement for Repatriation of Displaced Myanmar Residents from Bangladesh Under the Arrangement on Return of Displaced Persons from Rakhine State’. In this document, the Myanmar authorities assure that returnees will not be “settled in temporary places for a long period of time” and the transit camps in Myanmar will not become camps for ‘Internally Displaced Persons’.

8 In May 2020, the MoU was extended to June 2021.

18.3. The EU Pact's potential impact on the Rohingya refugee situation

In the official Q&A relating to the EU Pact, there are two questions on refugees, namely, 1) “What funding is available to support refugees and address migration issues outside the EU?”; and 2) “What is the EU doing to help other third countries hosting large numbers of refugees?” The answers to these questions are straightforward. First of all, the Neighbourhood, Development and International Cooperation Instrument (NDICI) proposed at €79,462 billion envisions funding in support of refugees beyond the EU. Furthermore, the proposed flexible nature of EU financial instruments will allow responding to “unforeseen circumstances” (European Commission, 2020c) or crises relating to migration and refugees. Secondly, the EU already has an existing track record extending a helping hand to refugees in need through a range of dedicated instruments, such as the EU’s Facility for Refugees in Turkey, or other initiatives like the Global Refugee Forum.

Although touted as “a new paradigm in the EU’s engagement with external partners” (European Commission, 2020c), the text of the EU Pact on Migration and Asylum explicitly mentions refugees and their host communities in Turkey, Lebanon, Jordan and Iraq, but surprisingly say nothing about the Rohingyas. Bangladesh, alongside Afghanistan, Iran, Iraq, and Pakistan, is listed as a ‘partner country’ in a footnote. One cannot ignore the possibility that the EU is concerned more about refugees on and near its borders than refugees from ‘faraway’ lands. Nevertheless, keeping in mind the answers to the questions relating to refugees, there is scope to believe that the EU Pact has the potential to impact the Rohingya refugee situation positively.

The EU Pact intends to deepen cooperation with partner countries by devising “tailor-made” (European Commission, 2020c) approaches that take into account their unique situations. These approaches will rely on a range of aspects which include, among others, the protection of refugees and supporting refugee-host countries, and also addressing the root causes of irregular migration. So far the EU’s response to the Rohingya refugee situation has been an amalgamation of extending financial aid and enforcing sanctions. Since 2017, the EU (2020d) has furnished humanitarian and development aid in the form of “food assistance, shelter, health care, water and sanitation support, nutrition assis-

tance, education, and protection services” valued over €226 million as a response to the plight of the Rohingyas. In April 2020, the European Council renewed the existing sanctions regime against Myanmar for another year.

This does not imply, however, that the EU does not share a ‘relationship’ with Myanmar. Till date, after China and Thailand, the EU is Myanmar’s “third biggest trade partner” (European Commission, 2020e). Furthermore, although the EU is also one of the key partners in Myanmar’s transition to democracy, the mVoter 2020 application (Strangio, 2020) launched before the general elections held on November 08, 2020, is one of those things that stand out like a sore thumb. Funded by the EU’s STEP Democracy Project, the app was launched to assist Myanmar’s democratic transition. Despite many positives, this app has also ended up “validating Myanmar’s systemic discrimination and exclusion” (Stolton, 2020) of the Rohingyas by listing at least two Rohingya candidates as ‘Bengalis’ (Reuters, 2020), in other words implying that they are immigrants from Bangladesh. The EU’s strong calls to the Myanmar authorities to remove such controversial data (Reuters, 2020) which are very likely to exacerbate ethnic tensions (Strangio, 2020) were ignored. The end result has been the exclusion of about 2.6 million ethnic-minority voters, including the Rohingyas from the general elections. As of now, the several hundred thousand Rohingya’s remaining within Myanmar are confined in camps and villages with limited access to health care and the right to move (Al Jazeera, 2020b).

In realpolitik, it is not uncommon for compromises to be made during the long and arduous journey towards democratic rule. However, in light of the above, one wonders to what extent the EU (2019) is effectively following through on its commitment to supporting “the voluntary, safe, sustainable and dignified return of Rohingya people to their places of origin, with the full involvement of UNHCR, in compliance with international law.” If the EU’s tailor-made approach of the future based on the EU Pact is to be effective, it needs to ensure that its funded projects do not end up “validating Myanmar’s systemic discrimination and exclusion” (Stolton, 2020). How the EU shall achieve this while simultaneously continuing to lend much-needed support to Myanmar in its transition to democracy will be tricky. This should not be a reason for the EU to shy away from rethinking its approach to solving a problem as complex as the Rohingya refugee situation, which is affecting millions of lives decade after decade.

18.4 Concluding thoughts

In his speech at the recently concluded online donor conference, Md Shahriar Alam (2020) critiqued the international community's "business as usual approach" and efforts to appease Myanmar "through increased bilateral trade, investment and development assistance". One cannot help but speculate whether Alam was referring to, among other things, the EU's existing relationship with Myanmar. Perhaps the most telling remark by Alam came at the very end of his speech when he said: "The role of the United Nations in saving 'humanity from hell' is also not visible in its policy actions towards Myanmar." There is no way to interpret this as an off the cuff remark. Instead, it may well be a clear reflection of Bangladesh's eroding confidence in the UN and the specifically UNHCR's ability to resolve the Rohingya refugee situation.

Even a cursory reading of the new EU Pact on Migration and Asylum shows how significantly it draws from the UN Global Compact on Refugees. It has been said that the UN GCR shall achieve its core objectives through the "mobilization of political will". One of the four core objectives of the UN GCR is to "support conditions in countries of origin for return in safety and dignity". Bangladesh's crisis of faith may stem from the belief that its partners like the EU and UNHCR have been focusing primarily on alleviating the plight of the Rohingyas inside Bangladesh on an ad hoc basis, but has been doing so at the cost of "pushing for any real change within Myanmar" (Tasneem, 2020).

The EU would benefit from paying attention to critics who have voiced their concerns about how it has engaged with the Rohingya refugee situation so far. Echoing Mohammad Shahabuddin (2020), lending support to "a model of low-intensity democracy" that ultimately exacerbates ethnic tensions is not the way forward. A genuinely tailor-made policy towards the Rohingya refugee situation, the kind of policy that is envisioned in the new EU Pact and reflects the ethos of the UN GCR, must strive for two complementary goals. First of all, the EU should work with Bangladesh so that it gives voice to and enhances the rights of the Rohingyas and respect the principle of non-refoulement, something the EU can do effectively if it acknowledges that Bangladesh is very likely suffering from a 'crisis of faith'. And secondly, the EU must prioritize creating conditions to ensure the voluntary, safe, sustainable and dignified return of the Rohingyas to Myanmar by addressing the

‘root causes’ of their plight. This will catalyse the process of Bangladesh regaining its faith in the international community that has eroded with time.

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19. The New Pact's Focus on Migrant Returns Threatens Africa-EU Partnership

Tsion Tadesse Abebe and Aimée-Noël Mbiyozo

19.1 Introduction

The European Commission (EC)'s New Migration and Asylum Pact (New Pact) is aimed at rebuilding trust and developing workable compromises within the European Union's (EU) 27 states.¹ This could well be achieved at the expense of partnerships with Africa. The New Pact's emphasis on migrant returns and strengthening external borders is contrary to Africa's position and could affect negotiations around the Post-Cotonou Partnership Agreement (ACP) and the Africa–EU Strategy.

Decreasing irregular migrant arrivals and enhancing returns are among the seven thematic areas of the New Pact that aim to increase returns by implementing a common EU system that combines stronger structures with more effective cooperation with third countries. Measures include strengthening border control, signing returns agreements with third countries and allowing EU Member States to choose between resettling refugees and sponsoring returns.

19.2 Europe's growing focus on returns

Overall irregular border crossings to EU Member States have dramatically decreased since Europe detected 1.82 million illegal external border

1 Part of this Chapter was published by the Institute for Security Studies (Abebe and Mbiyozo, 2020).

crossings in 2015. According to UNHCR (2020a) data, 95,031 refugees and migrants crossed the Mediterranean into the EU during 2020.

As irregular arrivals have decreased, EU institutions and Member States have increased their focus on returning migrants. Within the EU, where migration is deeply divisive among Member States, enforcing returns is one of the few unifying topics. According to the New Pact:

“EU migration rules can be credible only if those who do not have the right to stay in the EU are effectively returned. Currently, only about a third of people ordered to return from Member States actually leave. This erodes citizens’ trust in the whole system of asylum and migration management and acts as an incentive for irregular migration.” It goes on to state that an average of 370,000 asylum applicants are rejected each year and a third are returned home.

19.3 Pressure on Africa

According to Eurostat (2020), Africans make up a small minority of asylum claims in the EU per year. Their claims are far exceeded by those of other nationals including Syrians, Afghans, Iraqis, Pakistanis, Turks, Iranians and more recently Venezuelans and Colombians. In 2019, only 9,655 returnees – six percent of total returns – were sub-Saharan African nationals.

Despite these low numbers, the EU directs a lot of returns pressure towards Africa. In recent years, the EU and its Member States have tried to compel African states to accept and facilitate returns and readmissions through various legal and political instruments. Under the European Commission’s (2016) New Partnership Framework, 13 of the 16 priority countries are in Africa, namely Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Côte d’Ivoire, Algeria, Morocco and Tunisia.

19.4 Africa’s divergent priorities

African negotiators have consistently resisted forcing states to take back their returned nationals and failed asylum seekers. African migration is predominantly intra-continental. According to the International Organization for Migration (IOM, 2020) Africa Migration Report: Challenging

the Narrative, 21 million of the world's 39.4 million African-born migrants (53.2%) live in Africa. UNHCR (2019) says Africa also hosts 25.7 million of the world's 79.5 million displaced people. The continent is working towards free movement, free trade and regional integration. Strengthening securitised measures to prevent or deter migration are contrary to these priorities.

Contrary to the narrative that portrays African migration flowing principally to the EU, far more Africans are using the Eastern Routes to get to the Middle East and Gulf via Yemen. In 2019 alone, 138,000 Africans used the treacherous Eastern Route; between 2006 and 2016, over 800,000 African migrants and refugees crossed to Yemen.

Accepting returns is politically difficult for many African countries. Cooperating with EU members on forced returns can hurt the legitimacy of governments. This resistance by African governments is driven by the urge to avoid being branded as facilitators of deportation of their own citizens.

According to VOA (Hoiye, 2016), in December 2016, Mali was offered USD 160 million to cooperate on migrant returns, but it withdrew from the deal due to a public outcry. According to the New Humanitarian (Hunt, 2020), the Gambia faced public outcry after it signed a similar informal arrangement in May 2018. Returns from Germany began accelerating and media images of deportees in handcuffs and shackles arriving in the Gambia from Germany at a time of massive youth unemployment resulted in mass protest. The government eventually stopped cooperating on returns to offset potential damage to their constitutional role as protectors of their citizens – and subsequently hurt public trust in them.

The other factor is remittances which serve as the most dependable source of income to many African societies. According to IOM (2020) Africa Report, Africa received USD 81 billion in remittances in 2018. In contrast, the United Nations Conference on Trade and Development (UNCTAD, 2019) reported a total USD 46 billion in foreign direct investment to Africa. The World Bank (Ratha, 2019) has established that remittances are the most important source of external financing in low- and middle-income countries; in most cases they are larger than development aid and foreign investment combined. Cooperation on returns could attract development funding, but citizens fear losing remittances.

The New Pact proposes a “one stop asylum” system with a centralised and accelerated system for asylum decisions. It applies mandatory pre-entry identity, health and security screening. Those likely to receive asylum would be designated to an EU country responsible for their application. The rest would enter a ‘fast-track’ application process in border facilities, based on their country of origin. If rejected, they would be returned to their country of origin. Both processes will take 12 weeks. Overall, this approach erodes refugee protection regimes, raising many procedural and human rights concerns such as eliminating the chance to appeal if rejected.

Vulnerable Africans genuinely seeking protection must surpass extraordinary barriers to reach Europe. The measures taken to stem irregular migrants increase the barriers for legitimate travellers and have made these pathways even more difficult and dangerous.

19.5 Securitisation of human mobility

Returns form part of the EU's migration approach towards Africa that is focused on externalisation policies and an overall securitisation of human mobility. These measures have reduced irregular entries to the EU at severe costs to Africa and are not aligned with Africa's migration priorities.

A 2019 Institute for Security Studies report (Abebe, 2019) examining the impacts of European policies in Agadez, Niger, revealed many adverse impacts. Agadez is a key transit point between West Africa and the Sahel and the Maghreb region. It is estimated that a third of all migrants travelling through Agadez end up on a boat to Europe. The EU's interventions to dismantle Agadez's ‘migration industry’ without putting in place alternative means of income generation for its residents have significantly diminished the local economy. Traders who provided goods and services such as food, water or phones have lost their livelihoods. Development aid promising to replace these livelihoods has not arrived fast enough and many people have been disenfranchised.

While these measures have curtailed the local smuggling industry, they have unwittingly contributed to a rise in others. Large criminal syndicates have been able to adapt and continue to provide smuggling

services, while smaller Nigerien smuggling operators such as drivers or hostel operators have lost their business. Sudanese smugglers have capitalised on these shifts and offered new – and riskier – pathways through less-travelled parts of Chad and Sudan, including active conflict zones. This journey costs five times more than the one via Agadez.

The government's inability to protect local economic actors has eroded public confidence in the local government. Molenaar (2017) quotes one official who said, "the locals ask us why we work for the EU rather than them, the people who elected them".

19.6 Development funds and visas used as leverage

The New Pact states all available tools should be used to enforce more returns. These include offering an additional 10% in development assistance to countries that cooperate and applying restrictive visa measures to those who don't. The Pact's visa proposal deepens the 2019 EU revised visa system by shifting to a multilaterally binding instrument.

Previous EU migration platforms included plans to expand visa pathways. Expanding immigration and humanitarian pathways has shown to successfully slow irregular migration when combined with strong enforcement measures, but the EU has moved away from these proposals.

Koch et al. (2018) argue that, in recent years, the EU has re-oriented migration policies to bundle restrictions within development funding under the auspices of addressing the 'root causes' of migration. The New Pact directs even more funding towards security and surveillance measures – including allocations to repressive governments – than projects with true development potential.

Mbiyozo (2020) argues that this approach enables the horrific circumstances for migrants, refugees and asylum seekers in Libya. Migrants – mainly from East and West Africa – who pass through or are returned from failed boat crossings to Europe face 'unacceptable and extreme' forms of violence such as indefinite detention, extortion, torture, sexual violence, conscription and forced labour.

Since 2015, the EU Trust Fund for Africa has given Libya €435 million, including €57.2 million for border management. The EU has

provided direct funding, training and equipment to the Libyan Coast Guard, whose members have been implicated in smuggling and sustaining informal detention centres that operate as lucrative trafficking and smuggling hubs. EU development assistance is supposed to be spent on helping those in need and visa measures should remain bilateral.

19.7 Returns are complex

Removing unauthorised people from one country requires another country to accept them. Countries must cooperate and coordinate on nationality identification and the issuing of travel documents. Determining nationality is a state's sovereign right. It can be complicated to prove, particularly if migrants dispute their origin or are unwilling to cooperate.

According to Frontex's (2020) Risk Analysis, 14,346 people of 'unspecified sub-Saharan nationals' arrived in Europe in 2019, up from 69 in 2018 and 0 in 2017. These statistics suggest that authorities created a new classification for undocumented migrants whom they suspected were African but could not confirm it because those individuals refused to disclose or dispute their country of origin to avoid being returned.

Third-country returns, meaning expelling someone to a country where he or she is not a national, are particularly contentious. Transit countries have strongly resisted accepting returns of non-nationals. Some have been expelling migrants and asylum seekers themselves. Human Rights Watch (2020) reports that, during 2020, Algeria has forcefully expelled thousands of migrants and asylum seekers to Niger regardless of nationality. Expelling people to transit countries does not sustainably resolve any issues and sets a problematic precedent.

The Institute for Security Studies (Mbiyozo, 2019) found that, even when all parties agree to returns, reintegration schemes for failed asylum seekers or irregular migrants from the EU to Africa have been largely ineffective. They have instead resulted in hardship, violence and even re-migration. Many cases have been documented where returnees have not received the assistance they were promised. Some people have even been returned to the wrong countries.

19.8 Negotiations at a standstill

The African Union (AU) and its Member States maintain that returns must be voluntary despite mounting pressure across bilateral and multi-lateral platforms. According to Slagter (2019), only Cape Verde has signed a formal readmission agreement with the EU, while Ethiopia, Guinea, the Gambia and *Côte d'Ivoire* have agreed to informal arrangements.

Returns are one of the key factors behind the existing EU-ACP negotiation deadlock. The current Cotonou Agreement includes a non-binding clause (under Article 13) for countries to readmit nationals whose asylum applications are rejected. The Council of the European Union (2018) wants to include a legally binding clause forcing states to accept non-voluntary migrant returns.

The existing EU-ACP Cotonou Agreement expired in February 2020 and hasn't been replaced. African member states – comprising 48 of the 79 ACP states – strongly oppose forced returns and insist that any returns must be voluntary. The disagreement on returns has contributed to this deadlock. The New Pact's reiterated focus on returns could further compromise negotiations.

Enhancing returns and readmission is also a critical area of focus of the migration and mobility priority area of the EC's Joint Communication and Council Conclusions related to the Africa-EU Strategy. Negotiations on this deal were postponed until 2021 due to Covid-19. Abebe and Maalim (2020) concluded that, despite insisting that the Africa-EU strategy is a "partnership of equals", as it stands, the Communication and Council Conclusions don't sufficiently reflect Africa's priorities, including reiterating securitised perspectives towards African migration.

African negotiators have consistently resisted forcing states to take back their returned nationals and failed asylum seekers, including throughout the duration of the UN Global Compact for Migration. Notably, this compact isn't mentioned in the New Pact – nor are the Global Compact's principles on safe and dignified returns that respect the rights of returnees in line with international and regional laws and norms.

19.9 Conclusions

The New Pact reflects the EU's priorities, underscoring that returns are one of the key unifying factors among its Member States. It does so at the expense of African partnerships or true solutions to migration management from Africa. The renewed focus on returns will affect important non-migration agreements, most notably the ACP and the Africa-EU Strategy.

The EU's reorientation of migration policies prioritising the stemming of migration flows has had numerous adverse effects – intended and unintended – on Africa. These restrictive policies are incompatible with the EU's own free movement regime and are inhibiting Africa's efforts to implement its own version.

The New Pact wrongly assumes that the threat of fast deportation will deter migrants and refugees from attempting any movement. They undertake extraordinary risks because they have to. There is also no evidence that a country's willingness to accept forced returns will result in a high number of returns or deter future arrivals.

The AU and its Member States should remain focused on their key priority – Africa's regional integration agenda. Implementing the African Continental Free Trade Area and expanding free movement are critical to achieving Africa's objectives – sustainable and inclusive growth, good governance, and peace and security.

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20. Trends In Brazil's Practices of Refugee Protection: Promising Inspirations For the EU?

Liliana Lyra Jubilut and João Carlos Jarochinski Silva

20.1 Introduction

Last October, Brazil was elected to chair the United Nations High Commissioner for Refugees (UNHCR) Executive Committee (ExCom) (Brasil- Ministério das Relações Internacionais, 2020) in what can be seen as a culmination of positive perceptions of the country's refugee protection practices (ACNUR, 2003; Murillo Gonzales, 2010; Grandi, 2019). These practices encompass both traditional topics of refugee protection and durable solutions – starting with the national law on refugees in the late 1990s, followed by the proposal and implementation of resettlement in solidarity in the early 2000s, the adoption of humanitarian visas from the 2010s and, more recently, the treatment of Venezuelans arriving in the country.

At a time when the European Union (EU) is discussing refugee protection and governance (even though there are questions about the comprehensiveness and honesty of the proposals (Crisp, 2020), as well as of combining migration and asylum (Gilbert, 2020; see Chapter 3)), assessing existing practices that (i) are said to be based on solidarity, (ii) are perceived as responses to 'crisis', and, (iii) might inspire or be replicated (through the practices in themselves or from trends among them) can be relevant. This is true especially in terms of ensuring integral protection (i.e. human rights and migratory status rights) (Jubilut and Apolinário, 2008a), as well as the balance between states' interests and refugees' rights. This text aims to aid in this endeavour, by briefly describing each of these practices and diagnosing trends in Brazil's protection of refugees.

20.2 Brazil's praised practices of refugee protection

The first praised Brazilian practice towards refugees was its national law on the issue – Law 9474 of 1997 (Brasil, 1997). It was adopted after the redemocratization of the country, in a period of increased concern for human rights (Jubilut, 2006) and was seen as a model for the region (ibid.). This perception derived from the fact that it:

1. adopted, alongside the universal definition of refugee, the regional concept stemming from the Cartagena Declaration (Rodrigues, 2020) thus allowing persons fleeing gross and generalized violence of human rights to be regarded as refugees,
2. created a federal organ vested with the responsibility for refugee status determination (RSD) and policies towards refugees,
3. established an administrative procedure for RSD in the country and
4. linked refugee protection and human rights (Jubilut and Zamur, 2017).

Secondly, Brazil became an emerging resettlement country in the early 2000s and regionally proposed the 'Resettlement in solidarity' initiative (Jubilut and Carneiro, 2011), which was adopted in the 2004 Mexico Declaration and Plan of Action. It encouraged countries in Latin America to create resettlement programs and to implement them based on solidarity, i.e. not focusing on the potential of refugees for integration but rather on their protection needs (ibid.). The initiative resonated in the region especially due to the Colombian crisis. Brazil has resettled mainly Colombians and Palestinians through the initiative (Jubilut and Zamur, 2018). The numbers of resettled refugees in Brazil are small, and reception of new cases was almost paralyzed in recent years – even though resettlement is a key component in the "solutions" aspect of the 2018 Global Compact on Refugees (GCR) (paras. 90-93), but the practice has been lauded as it has opened new avenues of protection (ibid.).

In 2012, once again beginning with a regional focus, Brazil adopted humanitarian visas to assist in the protection of Haitians in light of the 2010 earthquake. This has been a third praised practice and in 2013, it was extended to persons affected by the Syrian conflict. The *ad hoc* measures aimed at facilitating the entry of displaced persons from these

contexts into Brazil; in what could be understood as a complementary pathway to admission, an avenue of protection sought by the GCR (paras. 94-96). However, they did not secure legal migratory status for them once they were in the country, leaving them with a precarious legal basis (Jubilut, Andrade and Madureira, 2016). The adoption of the new Brazilian Migration Law - Law 13 445 of 2017 (Brasil, 2017) has largely changed this scenario as it establishes humanitarian welcoming as a principle (Article 3, VI) and temporary humanitarian visas (Article 14, I, c) as a possibility. Moreover, since the law's adoption, the humanitarian visa regulations seem to have built-in measures to grant legal migratory status (thus being both an entry visa and a residency visa) (Brazil, 2019). The *ad hoc* component of the granting of humanitarian visas, however, remains.

This may be explained by the fact that geopolitics still plays a relevant role in Brazil's practices towards refugees, which is exemplified in the fourth praised practice to be mentioned - the treatment of Venezuelans arriving in the country, by *Operação Acolhida* (Brasil, n/d). Due to the increased influx of Venezuelans, the federal government established this operation in 2015, giving a leading role to the Armed Forces, aimed at ordering the border of the northern state of Roraima (the Venezuelans' main entry point into Brazil in this current displacement). The initiative led to the creation of shelters, the enhanced presence of international organizations and NGOs in the region, the structuring of bureaucratic procedures for legal migratory status, and the novel practice of *interiorização*, i.e. the redistribution of the refugees to other Brazilian states. *Interiorização* can be perceived as an "internal resettlement" and has a dual focus - firstly, to relieve pressure on Roraima (which historically has had high levels of inequality, insufficient social and economic structures and problems in terms of access to rights and services (Jubilut and Jarochinski Silva, 2020a) and secondly, to aid refugees in rebuilding their lives.

However, even though the operation has earned prizes (Godinho, 2018) and inspired suggestions of a similar approach in the EU (Góis, 2020), certain realities have come to light, namely:

- (i) integration remains a challenge;
- (ii) the success of relocations also needs to be explained by the limits that the geography of the northern states naturally create;

- (iii) refugee numbers in general in Brazil although high compared to the country's history are still small in comparison to others in the region, and
- (iv) there are concerns about the respect of international norms in some practical aspects of the treatment of Venezuelans in Brazil, such as access to adequate procedures and even to refuge itself (Jarochinski Silva and Jubilut, 2018; Jubilut and Jarochinski Silva, 2020b).
- (v) moreover, it seems that resettlement has been put on hold as the government has focused on *Operação Acolhida* (Jubilut and Zamur, 2018).

20.3 Trends in Brazil's Refugee Protection

Although praised as “good”, these practices have attracted criticism both in themselves and for not being systemic decisions but rather ad hoc policies – within a broader critique of Brazil's non-holistic migration and refugee governance, as well as due to concerns regarding human rights and international refugee law, as outlined in the GCR's principles (paras. 5 and 9). However, they seem to put good “bones” in place, from which improved protective structures can be built. Furthermore, most of these practices have been created in light of and as responses to significant increases in the influx of refugees into Brazil compared to the national numbers, and seem to be innovative.

In this regard there are three aspects of Brazil's practices that can also be seen as noteworthy trends: a focus on solidarity, the implementation of multi-level partnerships, and the crucial role of cities.

Solidarity can be noted both in the ‘Resettlement in solidarity’ initiative and in the practice of *interiorização*, and is present both towards the states (i.e. those countries that were receiving large numbers of Colombian refugees in the first, and the state of Roraima in the latter) and to the displaced, in a dual approach. Solidarity might be a principle worthy of replicating in a regional context of developed cooperation and open internal borders such as the EU, (and also) in a scenario where trust seems to be lacking (Thym, 2020).

Multi-level partnerships, which seem to be long-operating in Brazil, is another interesting practice to be considered in discussing the new EU

New Pact on Migration and Asylum (EU, 2020). Since before its national law on refugees, but with renewed strength after it, a tripartite structure of refugee protection (involving the federal government, the international community represented by UNHCR, and civil society) has been in place in Brazil (Jubilut, 2006; Jubilut and Apolinário, 2008b) pre-existing the approach of partnership and multi-stakeholder participation of the GCR (paras. 13, 22, 33-44, for instance).

Initially working on RSD, assistance and integration, the structure has been replicated in the resettlement in solidarity initiative, as well as in the *Operação Acolhida* (including *interiorização*). In the latter, a significant increase in the number of participating national and international civil society organizations, and of organizations and organs linked to the United Nations, has been noted. Multi-level partnerships in Brazil play a key role in integral refugee protection, as well as in delineating the issue as belonging to the country as a whole and not just of the government. This might be a positive lesson for when considering constructive and protective governance. Moreover, a new local actor has also gained relevance and added a new layer to multi-level partnerships in Brazil – i.e. cities.

Cities have become key partners in the *interiorização* (for example, their acceptance in receiving Venezuelans, at least in theory – given that in practice most internal redistribution seems to stem from personal or familial ties of the refugees themselves), thus allowing for the observance of two axes of multi-level partnerships in Brazil's refugee protection: government-international community-civil society; and federal government-states-international organizations-cities.

The role of cities had already been highlighted in the 'Resettlement in solidarity' initiative as they had volunteered to receive the resettled refugees, took part in the selection process, and worked with civil society and UNHCR in their integration (Jubilut and Carneiro, 2011). In Brazil, cities do not have the power to issue documents, which in the case of *interiorização* is provided prior to relocation, by a nationally accepted document – even with provisional status – (this immediate and at the point of entry issuance is a good practice that could be replicated by the EU). Cities also cannot make decisions in terms of legal status for migrants, but, in Brazil's federal system, the municipal governments are vested with the responsibility of the direct implementation of social programs (even some funded by the national government), therefore

being essential in the issues of health, education and shelter. Thus, having this increased role of cities is a positive step toward integral protection of refugees and other migrants.

Besides solidarity, multi-level partnerships and the increased role of cities, there are three other trends that can be identified in Brazil's refugee protection good practices and that may be interesting to assess when the EU is re-thinking its governance of migration.

First, there is the fact that, as mentioned, Brazil's actions in migration in general and refugee protection more specifically are not as a rule systemic but rather *ad hoc* policies. In this sense, they differ from the EU's New Pact that is said to posit general principles for later consensus (Betts, 2020) or be a police guide (Carrera, 2020; see Chapter 1). This *ad hoc nature* can have both positive and negative aspects, as, on the one hand, actions may be faster and grant rapid protection while more general rules and practices are being determined and can also be tailored to specific situations while political will is gathered for more systemic policies, and, on the other hand, they are impacted by political will and action.

Second, and relating to this last point, another trend in Brazil's refugee protection is that it seems to default towards a reactive nature. On the one hand, this leads to *ad hoc* policies and a non-systemic architectural structure of protection; on the other, it shows that good practices can emerge in light of a crisis or emergencies, highlighting that innovative refugee protection and policies that combine states' interests and refugees' needs can exist.

Lastly, another relevant trend is that Brazil's refugee protection practices by and large respect rights. Although there is always room for improvement, and there are occasional violations (that might be severe, such as in the closing of borders without exceptions for refugees (Jubilut and Jarochinski Silva, 2020a), individual cases of non-refoulement in the past (Jubilut, 2015), and more recently a government decision of denying claims without allowing the asylum seekers to be interviewed (DPU, 2020; CNDH, 2020), they tend to be more contextual than systemic. Respecting rights is central to the political decisions of migration governance; hence this trend, as a general aspect and upheld to a great extent by the tripartite system (particularly civil society and human rights-mandated public organs), in Brazil's refugee protection practices is noteworthy.

20.3 Conclusions

From the aforementioned practices regarded as “good”, to several of the identified trends, Brazil might offer inspiration for new structures of migration governance. There is room for criticism as well as for improvement, but some of the broader brushstrokes can offer positive paradigms towards enhancing protection for both refugees and other migrants in an increasingly challenging global environment.

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21. Redistributing EU 'Burdens': The Tunisian Perspective on The New Pact on Migration and Asylum

Betty Rouland

21.1 Introduction

Regarding the so-called 'New' Pact on Migration and Asylum published on 23 September 2020 by the European Commission, Tunisia is more than ever in the firing line of the European Union (EU) for the implementation of its extraterritorial migratory policies (European Commission, 2020). The country, located at the Southern shore of the Mediterranean Sea and sharing a border with Libya, represents a central player for the EU with its multiplying arsenal of instruments for managing human mobility in the macro-region. This situation stands in a long line of instances of 'cooperation' on migration between Tunisia and the EU that started on 25 April 1976 (Limam, 2020a).

By an even stronger reinforcement of the security approach initiated over the last decades, the Pact places cooperation with third countries at the heart of its strategy of externalisation. It insists on control, tracking and expeditious screening for 'return' or relocation while making the refugee status process extremely tedious. In view of the migratory situation and the multidimensional tensions characterizing the Mediterranean Sea region, room for manoeuvre by the Tunisian government might be renegotiated. In the Pact, the focus on 'migration partnerships' exemplifies how Tunisian mobility facilities is conditioned by readmissions agreements, and how the label 'partner' proves not to be appropriate. So far, Tunisia has deployed a strategy based on a triple approach: officially resisting, cooperating on the ground and adopting a lethargic position on legal issues.

21.2 The Pact: from territorial exclusion to inclusive cooperation with third countries

Not shifting from previous paradigms, the Pact is merely an extension of a coercive approach for promoting externalised and de-territorialised policies on migration and asylum in third countries including Tunisia. The Pact makes a priority of excluding non-EU citizens from its territory while it advocates inclusive cooperation with third countries.

Classified as a country of departure (of origin and transit), Tunisia accumulates what the EU considers 'burdens' to be redistributed. On the one hand, Tunisia supplies the most important contingency of 'irregularized' migrants arriving to the Italian coasts. On the other hand, the instability in Libya positions Tunisia as an irresistible gatekeeper for the EU in regards to migrant and refugee flows. On top of that, the sensitive political transition as well as the economic gloom triggered by the uprisings have made the country one of the main providers of jihadists since 2011 (Attia, 2019). In 2020, the pandemic crisis caused by Covid-19 further exacerbated multidimensional tensions favouring departures from Tunisia.

Consequently, the current context undeniably plays into the hands of the European Commission's Migration and Asylum Pact. With a total of 11,212 Tunisians arriving to the Italian coasts since the beginning of 2020 (41.2% of the total arrivals), the tone changed over the summer between both Mediterranean countries.¹ While this situation reminds us of similar frictions caused by the uprisings in 2011 (AFP, 2011), diplomatic pressures increased and the Italian foreign minister Luigi Di Maio threatened Tunisia with cutting economic support (equivalent to €6.5million) (Haddad, 2020). In response, a bilateral agreement on the readmission of approximately 80 Tunisians a week in two flights was concluded between Italia and Tunisia (Ziniti, 2020). The civil society has been denouncing the lack of transparency of this agreement as well as the lack of accountability and the systemic violation of human rights (FTDES, 2020).

The terrorist attack on the Notre Dame Basilica in the French city of Nice on 29 October 2020, committed by a Tunisian national, placed the security question back on the table. The terrorist arrived in the EU on

1 For more data, see: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.

the island of Lampedusa, one European fortress gateway for migrants. In the aftermath of this tragedy, the French Minister of the Interior Gérard Darmanin met his North African counterparts in Tunis in November 2020. His goal was to pursue cooperation against terrorism and to negotiate the expulsion of radicalized Tunisians. While neither negotiation on readmissions nor cooperation against terrorism are new diplomatic topics, the analogical picture linking irregular migrants, refugees and terrorists has effectively moved the humanitarian debate into a 'justification of security' narrative. During an official visit in France, the new head of the Tunisian government, Hichem Mechichi, had struck a fatal damaged declaring 'and who says illegal migration, also says terrorism' (Perelman, 2020).

21.3 A matter of form and substance

If the Tunisian government firmly affirms its sovereignty on migration issues refusing the project of 'hotspot' on its territory, several types of cooperation remain in substance from the 1990s including a long series of agreements (Bisiaux, 2020). Those agreements essentially link the EU's financial support in Tunisia to the European Union Emergency Trust Fund (EUTF for Africa), estimated at €57m to be distributed to different tasks for managing migration and asylum issues (controls, strengthening of capacity-building, fighting human and migrant traffic, etc.) (Bisiaux, 2020).

The Pact multiplies concepts or instruments for returning irregularized or undesirable people to their home countries or third countries: 'Return Directive', 'effective return policy', 'return systems', 'return border procedure', 'return policies', 'return sponsorship', 'return programmes', etc. In doing so, the lexicon used in the Pact clearly embodies the priorities made to exclude non-EU citizens from quicker and more effective procedures. In the Pact's proposal, the 'return' for non-pre-selected people facilitated by the cooperation with third countries appears a key objective as shown by the occurrences of the term 'return' (-s, -ed, -ees, -ing) (98 times), 'cooperation' (70) or 'third countries' (35).

While 'voluntary return' is a recycled objective (from the Commission's 2018 proposal on the Return Directive), the introduction of the concept of 'return sponsorship' is well worth a cosmetic terminolog-

ical operation. Defined in the Pact as providing support to the Member State under pressure ‘to swiftly return those who have no right to stay’ (European Commission, 2020: 5), the objective in substance aims to achieve the same goal. As a complex puzzle of procedures, the ‘return sponsorship’ is an unclear incentive of ‘solidarity practice’ and ‘partners’ from third countries have not been taking into consideration (Cassarino, 2020).

21.4 Upstaging the ‘monkey on our back’: asylum and refugees in the context of a legal vacuum

In the Pact, the novelty is that screening procedures seek efficiency in ‘instituting a concomitance’ between the examination and the application for asylum or the return decision (Limam, 2020b). The document clearly underlines the aim ‘to establish a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure – thereby integrating processes which are currently separate’ (European Commission, 2020: 4). By making asylum and return as ‘part of a single system’ (European Commission, 2020: 3), the screening upstages the refugee’s assistance and contradicts the *humane approach* claimed by the von der Leyen Commission (European Commission, 2020). Priority is clearly on the protection of EU borders rather than on the protection of people; refugees and asylum are now a ‘subset’ of irregular migration (Spijkerboer, 2020; see Chapter 5). As a result of the relegation of this thorny ‘burden’, the Pact emphasizes that juridical status supplants human rights.

Despite the ratification of the 1951 Geneva Convention on refugees and other associated protocols, Tunisia does not offer legal protection to refugees. In 2014, impelled by the context of democratic transition, Tunisia adopted a new constitution which recognizes the right to political asylum in Article 25 (Haon, 2012/3). This took place alongside a project of law on asylum in Tunisia. It was reworked until 2018, but since then nothing has happened (Limam, 2020b). In compliance with international standards, the adoption of this law would permit expulsion or deportation (called ‘return’) to Tunisia including Tunisians but also citizens from third countries. Widely mobilized, the civil society is calling for the establishment of an effective asylum system (Euromed Rights, 2019).

To some extent, the camp of Choucha was a prelude for upstaging assistance to asylum seekers and refugees. Near the Libyan-Tunisian border post of Ras Jedir, this camp opened in 2011 and was managed by the UN Refugee Agency (UNHCR) primarily to contain flows of people fleeing the armed conflicts in Libya (Haon, 2012/3). In the camp, procedures of returns (organized by the International Organization for Migration), or resettlement in a third country (administered by UNHCR), coexisted (Haon, 2012/13). Regarding the procedures for seeking asylum, multiple irregularities have been denounced (e.g. lack to access to interpreters) (Carrera et al., 2018). With almost 18 000 individuals in the camp, it closed officially in 2013 but it was dismantled in 2017 by Tunisian authorities. Back then, people refused to leave the camp because Tunisia does not legal perspectives (asylum, residence or work permit). Since then, people have desperately been waiting for refugee status – which does not yet exist in Tunisia (Blaise, 2019).

Tunisia has developed a strategy of 'response/resistance' and the law on asylum is not the only project pending (Limam, 2020a). It is precisely the absence of a clear legal framework for asylum procedures combined with the violation of human rights that contradicts the idea one should consider Tunisia as a 'safe country' or among the list of 'safe third countries' – even though some EU countries refer to Tunisia as such. The Pact refers to 'a greater degree of harmonization for the concepts of safe (third) country on the EU list of countries identified as such' (Pact, 5). Tunisian NGOs and civil society organisations denounce this *status quo* advocating that only real measures for helping Tunisia become a safe place would permit one to consider the country hospitable (Bisiaux, 2020).

21.5 Complex chessboard

A key innovation of the Pact is the call for solidarity among EU states preaching the notion of interstate for mutual trust (Carrera, 2020). In reference to the 2009 Lisbon Treaty, EU countries must improve their cooperation in order to redistribute more equally the 'burden' of asylum seekers and refugees. A sustainable approach prioritizing assistance to migrants and refugees was seemingly discarded by the Pact which all the same advocates rather inclusive cooperation with third countries for containing, returning or relocating undesirable flows of migrants.

In doing so, the result (intended or not) has been international partnerships which are based on a balance of power rather than solidarity and mutual trust. The Pact mentions the importance of ‘an assessment of the interests of the EU and partner countries’ through ‘mutually beneficial partnerships’ (European Commission, 2020: 13) with neighbouring countries (specifically referring to) the North African region. However, this principle of reciprocity is conditioned above all by the level of cooperation of third countries on readmissions. Even more explicitly, the Commission indicates the application of restrictive visa measures in cases of ‘substantial and practical problems’ (European Commission, 2020).

Initiated in 2012, a ‘Mobility Partnership’ between the EU and Tunisia was signed in 2014 with the purpose of improving the management of migratory flows (Euromed Rights, 2014; European Commission, 2014). This includes, *inter alia*, the opening of negotiations for readmissions in exchange for a visa facilitation agreement (Limam and Del Sarto, 2015). If this partnership agreement is not implemented, the new conditions advocated in the Pact might compromise negotiations further.²

In the Tunisian context of democratization, legal progress is being driven by the mobilization of Tunisian civil society. Denouncing actively human rights violations (e.g. systemic racism) (Akrimi, 2020), NGOs are a new key actor for politicising the conditions of migrants and refugees without status in Tunisia. In respect to the Mobility Partnership, the Tunisian civil society criticizes the fact that it has not been consulted (Euromed Rights, 2014). Legal progress can be noticed as attested by the approved law in 2016 to prevent and fight against human trafficking (Journal Officiel de la République Tunisienne, 2016). Furthermore, a 2018 law sought the Elimination of All Forms of Racial Discrimination in Tunisia (even if the associated Commission has not yet been established) (Euromed Rights, 2018).

Since the 2011 uprisings, Tunisia has gone through major and multifaceted transformations including important challenges in terms of migration and asylum issues (Rouland and Bachmann, 2015; Boubakri, 2015). Furthermore, the migration landscape changed significantly as a

2 For the full text of the agreement, see: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/international-affairs/general/docs/declaration_conjointe_tunisie_eu_mobility_fr.pdf.

consequence of flows of people fleeing not only armed conflicts in Libya but also contexts of instability and insecurity in other countries (with an overrepresentation of Syrians, Ivorian, Sudanese, Eritreans, Somalis, and Guineans in 2020) (Castiello d'Antonio, 2020).

By barricading the EU fortress with long and discouraging visa procedures, Tunisia is receiving [new and varying inflows](#) (e.g. patients seeking care in Tunisia rather than in Europe) (Rouland and Jarraya, 2015). Consequently, labor migrants from sub-Saharan Africa are attracted by new labour possibilities (domestic work, construction) or specific services (higher education, private health services). As the EU transfers restrictive policies to third countries, thereby placing them under even further pressure, the Tunisian government in turn is developing strategies for control without establishing a legal framework for labor migrants. Local, national and (trans)regional intra-African mobility contexts are being ignored, and in the end, everyone is losing.

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22. Fresh Start Or False Start? The New Pact on Migration and Asylum

Petra Bendel

22.1 Introduction

On 23 September 2020, the European Commission presented its New Pact on Migration and Asylum, accompanying it with an ambitious statement of intent. The commissioners in charge, Ylva Johansson and Margaritis Schinas, promised no less than a ‘fresh start’ covering all aspects of EU migration and asylum policy, to the end of easing tensions and conflicts among the Member States and with the ultimate aim of forming the basis of a reliable common migration and asylum system.

The Commission was and is in an unenviable position: It has to rebuild trust and strengthen consensus among Member States after a long period of serious disputes over refugee policy. It has to stop the ‘race to the bottom’ in refugee protection and provide a framework for orderly migration. In the past few months, the Commission’s preliminary negotiations with its Member States and the European Parliament have entailed a lot of hard work that has resulted in a number of compromises. In what follows I will analyse the Pact’s principal proposals as to their innovative potential, their reliability, their chances of being implemented in negotiations, their potential efficiency and the protection of rights they afford, taking the two Global Compacts into consideration.

22.2 A communicative false start

The Commission did not do itself any favours with the unnecessarily high expectations it raised in advance of announcing the Pact. The proposals

in their current form, in line with their compromising character, have not been able to sustain their defined narrative of migration as a normal process rather than a crisis event (Bendel, 2017). Instead, the discourse of ‘irregular migration as the typical case’ or indeed of the ‘refugee crisis’ is in evidence again and again. The Commission’s introductory communication fails to explain how the proposals improve on the *status quo*. Indeed, quite to the contrary, it has left experts and non-experts struggling with an extensive loose-leaf collection of proposals for regulations and recommendations, opaque in form and content.

22.3 Familiar initiatives with a ‘twist’

The nine legal initiatives set out in the Pact do not offer many proposals with which we are not already familiar. Its centrepieces are pre-entry screening, asylum procedures at the EU’s external borders, and a proposal for ‘flexible solidarity’ rather than shared responsibility among the Member States. There is, then, little innovation in evidence; yet each aspect of the Pact has been given a new ‘twist’ to increase their appeal to the negotiating partners both in the Council and in the European Parliament.

First, the Pact (again) presents a proposal to abolish the Dublin Regulation and replace it with the screening of asylum seekers prior to their entry to a country (the criterion of the first irregular entry of the Regulation, however, among others, are maintained), flanked, if required, by asylum procedures at the EU’s external borders (Hruschka, 2016; Maiani, 2020; Carrera, 2020). In contrast to proposals presented in the past – specifically prior to the commencement of Germany’s EU Council presidency (July–December 2020) – the pre-entry screening procedure outlined here does not include any preliminary decisions on asylum (Statewatch, 2019). Its purpose is to capture a more detailed registration of asylum seekers and an additional security and health check. The asylum procedure would commence after this screening.

The proposal bears an evident resemblance to the ‘integrated refugee management’ introduced in Germany in 2016, whose central idea was to divide the applicants into different clusters for the asylum procedure right from the start (Informationsverbund Asyl und Migration, 2020). Very much like the clusters established there, the New Pact would implement

a distinct procedure for asylum applicants from countries with 'low recognition rates' and for those whose applications include information that is false or abuses the process, or from those who may represent a danger to national security. Depending on the group to which they are assigned, the system would channel asylum seekers into one of four possible procedures: resettlement, the 'conventional asylum procedure' (yet with very tight deadlines), a fast-track asylum procedure, or relocation to another Member State for consideration of asylum.

Second, the Commission has turned away from the principle of fair distribution of people seeking protection among the Member States – which has *de facto* never been in operation – and intends to replace it with a 'new solidarity mechanism' (at the same time mandatory and flexible). In accordance with the new mechanism, not every Member State will have to accept people seeking international protection and may opt for other instruments of 'solidarity' instead.

The 'twist' as compared to the principle of 'flexible solidarity' proposed by the Slovak Council presidency in 2016 is the new instrument of 'return sponsorship'. Instead of receiving refugees, a Member State can 'sponsor' people required to return to their countries of origin. This entails arranging the return; if the 'sponsoring' Member State fails to do this within a period of eight months, it must permit the person to enter its own territory – an idea that aimed both at facilitating cooperation with those Member States not willing to receive refugees (particularly the Visegrad-States) and at accelerating returns. However, Hungary, Poland and the Czech Republic were quick in rejecting even these new plans (Euronews, 2020). The Commission intends to specify at a later date a separate catalogue of operational and technical support measures that may serve as instruments of solidarity in this context. It remains to be seen whether this catalogue contains more elements that support, for instance, the reception and asylum standards in Member States under pressure or the European Asylum Support Office (EASO) and how the different possible contributions will be rated in the announced 'solidarity pool' (De Bruycker, 2020). The proposal further states that, where the migration system in a Member State is overloaded, the other Member States should take on a certain 'fair share' of refugees. It even provides for the possible relocation of recognised refugees in countries other than those of their first arrival.

22.4 No commitment to 'legal routes of entry', sea rescue or cooperation with third countries

Depending on the issue at hand, the proposals submitted differ widely on the extent of legal obligation they confer. Whenever they cover 'hard topics', the proposals are legally binding draft regulations. This is the case for the pre-entry screening and asylum procedures at the border (including an expansion of the EURODAC fingerprint system), the new regulation on the responsibility of Member States in times of crisis intended to replace the 'mass influx directive' of 2001, and the instruments of 'flexible solidarity'.

However, those aspects of the Pact relating to humanitarian issues of asylum and migration are recommendations only, and will lack any legally binding character. Obviously, the Commission anticipated Member States' poor agreement on these topics, therefore according them low priority. They include legal routes of entry, cooperation with countries of origin or transit (in order to achieve EU borders, migration and asylum objectives – which perpetuates the EU's well-known little attention to the interests of third countries and reinvents the wheel of the returns partnerships (Guild, 2020)). The precise content of most of these recommendations remains vague, regrettably so in the context of the Commission's recommendations for stabilisation of the resettlement system and its designation of funding (including private sponsorship) for this purpose (Leboeuf, 2020; Feith Tan, 2020; see Chapter 6). This is an issue that has also been encouraged by the Global Refugee Forum in order to reduce the pressure on host countries, but is here possibly combined with containment aspects (Carrera and Cortinovis, 2019). In some instances, the fuller formulation of these 'softer' aspects will not take place until sometime in 2021.

One of the areas thus affected relates to the opening of additional legal pathways to entry to the EU, which – also corresponding to the call for 'Global solidarity in the Global Compact on Refugees (United Nations, 2018) – has the potential to represent an opportunity to create a 'win-win' situation in negotiations with migrants' and refugees' countries of origin or transit, but is overshadowed by the Commission's conditionality on return, readmission and fighting against migrant smuggling as the centre piece of the external dimension of migration policies (Anrade, 2020).

The EU's New Pact's reference to 'Talent Partnerships', which might be inspired by the Global Compact on Migration's 'Global Skills Partnerships' remains vague and certainly non-binding (International Labour Organization et al., 2018).

Refraining from the criminalisation of private search and rescue organisations and coordinating rescue-at-sea operations among the Member States are further recommendations of the Pact, and doubtless desirable courses of action. The issue of search and rescue otherwise remains undefined, and certainly not subject to proposals of binding regulation; a contact group yet to be established would be required to report to the Commission once a year. Nevertheless, the Commission did provide for technical and detailed provisions for disembarkation following search and rescue operations.

The proposals remain grossly deficient in the other, crucial issues, such as substantial future regulatory arrangements regarding secondary movements and substantial measures pertaining to the internal borders of the Schengen area (Thym, 2020). Without these aspects, questions must remain as to the new asylum system's effectiveness in practice.

22.5 An over-ambitious timeline and unclear prospects of implementation

Taking into account the legal form chosen for the Pact – regulations instead of directives – , the prospects of implementing the laws and regulations directly effective in the Member States during the negotiations in the Council appear poor. Following the tendency noted in the context of previous efforts to reform the Common European Asylum System (CEAS), the Commission, in these new proposals, has completely refrained from drafting directives, which would still have to be transposed and implemented in the Member States (Pollet, 2019; Migration Policy Institute, 2020). Instead of directives, it proposes the issuance of binding and directly applicable regulations. This means that much is at stake for the Member States in the negotiations, and the negotiations are accordingly likely to be intense. It may therefore prove at the least challenging to keep to the ambitious timetable, which provided for mutual political consent by the end of 2020 and adoption by June of 2021.

This is still more the case, due to the fact that the Commission continues to insist upon completing the reforms to CEAS stuck in different stages of negotiations. These have been negotiated in a ‘package’ and largely depended on the Dublin regulation’s revision from which the Pact, however, now withdraws: the Reception and Qualification Directives, the Resettlement Framework and the regulation of the European Union Agency for Asylum (formerly EASO), on the reform of which provisional political consent is in place.

The content of the Pact appears to promise tough negotiation processes ahead. It would be surprising indeed if the States located on the EU’s external borders gave their consent to the new system, which transfers responsibility for preliminary examinations and border procedures onto them. Those States which opt to take on ‘return sponsorships’ are unlikely to agree without a murmur to take in all asylum applicants that they are unable to return after the scheduled period of eight months. Finally, still to take place are political negotiations regarding which additional instruments might be applied by Member States that refuse to receive asylum seekers within the ‘solidarity à la carte’. Defining these will be no simple endeavour.

22.6 Potential efficiency: More questions than answers

Even if the Dublin system will not be applied – at least not under that name – in the future, the new procedure at the heart of the suggested Pact raises numerous questions:

- How can we make certain that it will genuinely ease the pressure on Member States with external EU borders?
- How can we guarantee faster and more reliable screening, within the timeframe envisaged by the Commission of five to ten days, and quicker asylum procedures at the border, for which the Commission has set a timescale figure of 12 to 20 weeks at most?
- How can we ensure that Member States will comply?

We are yet to hear details of the resources, skills and powers that will be available – and necessary – for the achievement of these objectives. We might have been able to look forward to more efficient and harmonised procedures had a more radical proposal been presented, one proceeding

far beyond the reform of the European Asylum Support Office (EASO) – on which consensus has already been reached – and following the (albeit still perfectible) model of the German Federal Office on Migration and Refugees (BAMF), responsible for the registration, examination and decision of asylum claims and whose branch offices with specially trained personnel file the asylum cases. But here, too, the Commission did not venture far enough (Graff and Schneider, 2018).

Similar considerations apply to the question of how to avoid a backlog, and the potential concomitant development of new, perhaps even long-term flashpoints, in the Member States with external EU borders, which are currently already struggling to cope with the strain. The implications for accommodating refugees also merit consideration, with the much criticized pilot project on camp accommodation under EU supervision (Sanderson, 2020; European Commission, 2020).

22.7 Appropriate regard to fundamental rights and ‘vulnerable persons’?

Questions also arise on how these procedures will ensure respect for the fundamental rights of the migrants and refugees undergoing them, as required by international and regional refugee protection and human rights standards, as enshrined in the UN Global Compacts on Refugees and Migrants, as well as in the EU Treaties (Bendel, 2016).

The Commission has responded to concerns by installing a new independent monitoring mechanism, which might have had innovative potential if its operation had been placed under the auspices of the European Commission, the European Union Agency for Fundamental Rights (FRA) or another, independent institution (Cortinovis and Stefan, 2020; see Chapter 16). As it is, Member States will be tasked with conducting their own monitoring of respect for fundamental rights, which will entail forming a committee and possibly consulting the FRA. The worst-case scenario here is that this distribution of powers in an ‘independent monitoring mechanism’ will result in a situation in which the same State which has violated a law will judge these violations – a contradiction in terms.

The Pact proposes the identification of ‘vulnerable persons’ (as referred to in the diction of the Commission) during screening. These

individuals will not have to go through the accelerated asylum procedure mandatory for all others – a principle familiar to us from the Reception Directive. But what appears to be a humanitarian measure may suffer from important limitations on its practicability in view of the existing time pressure. Validation of the legal correctness of such a procedure and allocation of responsibility for its conduction will also be required. An additional question as yet unanswered is that of access to legal instruments: To whom can an asylum seeker (who has been rejected or deported) appeal, and who are the ‘appropriate authorities’ mentioned in the proposals?

22.8 Conclusions: A Herculean task rather than ‘a fresh start’

Rather than representing ‘a fresh start’ and instead of providing a new vision on real common principles and policies, the Pact re-issues well-known policy choices out of the drawer, although sometimes ‘with a twist’. Instead of presenting a new idea of solidarity, so strongly recommended in the Wikström-Report of the European Parliament, it relies more on the logics of ‘flexible solutions’ based on nationalistic interests (Hruschka and Maiani, 2017). The reliability of the suggested policies differs largely according to their ‘hard’ (securitized) or ‘soft’ (humanitarian) policies, thus showing where priorities are being set. Their chances of being implemented in negotiations are at least restricted, given that they are presented as regulations, not as directives. For the protection of rights the suggestions may afford the monitoring mechanism may be crucial, but should be re-designed.

To conclude, we are in no doubt that reconciling the increasingly diverging interests of individual States and managing the humanitarian disaster of European refugee policy represent a Herculean endeavour. Of course, our hope is that the Commission will successfully negotiate between the Member States and between Council and Parliament, ideally with the result of shaking up the existing impasse and softening intransigent stances. It may then be possible to return to the original targets: the protection of refugees and the regulation of migration which until now has remained largely unregulated. These proposals run to over 500 pages, yet with good reason we find their content wanting. We await the legislators’ views and decisions with interest.

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23. EU External Migration Management Policies in West Africa: How Migration Policies and Practices in Nigeria Are Changing

Amanda Bisong

23.1 Introduction

European Union policies have shaped the evolution of migration motivations, patterns and structures across West African states. From slave trade to colonial times, countries within the European Union (EU) have influenced who, where and for how long people in West Africa move. This influence continued in post-colonial West African states with the reduced but available mobility options for West Africans to European countries to study, work or reunite with family.

But these migration policies have become more restrictive over the years (Abebe and Mbiyozo, 2020). Consequently, the changes in migration policies between EU and West African countries have resulted in changes in migration patterns and decisions of migrants (Beauchemin et al., 2020). Although bilateral migration cooperation between West African and EU states has evolved to reflect these changing patterns, such measures have had the effect of externalising migration policies of EU states in West African countries. For most migrants and refugees in the EU that originate from large West-African countries like Nigeria, externalisation of the EU's migration policies has meant adopting an approach that extends European borders beyond the frontiers of African countries and into their internal territories (into the internal workings of the state). This has far reaching impact on the legal and political systems

in these countries and does not necessarily contribute to the intended outcomes of migration cooperation.

The EU identifies Nigeria as a priority country for migration cooperation. However, this cooperation has resulted in several practices with the potential to contradict its regional (ECOWAS), continental (Abebe and Mbiyozo, 2020) and International commitments, including the UN Global Compact on Safe, Regular and Orderly Migration (GCM) and the Global Compact on Refugees (GCR). The focus on return of Nigerian migrants from the EU (Uzomah, 2021), for example, has several potential areas for conflicting with the Objective 21 of the GCM which calls for cooperation between countries of origin, transit and destination in facilitating safe and dignified return and readmission, as well as sustainable reintegration. Furthermore, while most asylum seekers from Nigeria, may not be categorised as refugees within the definition of the Geneva Convention on Refugees (see article 1 of the Geneva 1951 refugee convention), they may still require complementary protection or non-expulsion on humanitarian grounds, hence emphasising the need for individual assessment of asylum requests.

23.2 The effects of EU external migration management policies on migration in Nigeria and free movement of people in Africa

As the external dimension of the EU's migration policies continues to gain traction, their direct and indirect effects can be observed in the national and regional practices, policies and legislations of migration partnership countries including Nigeria. While the EU has failed to achieve a readmission agreement with Nigeria, it has adapted its development cooperation which has yielded more results than formal agreements (Vermeulen et al., 2019).

23.2.1 Changes to national migration legislation and practices

Over the last decade, migration policies and reforms to immigration laws in West Africa have been supported by EU countries, either directly or through international organisations like the International Organisation for Migration (IOM). These national migration policies include sections that address reducing irregular migration from West Africa to Europe.

Nigeria is no exception. The national migration policy was supported by international organisations. Although the consultations and inputs were provided by the national stakeholders, the inputs still follow the standard template of most national migration policies, thus raising the question about ownership of the content of these policies.

Most of the West African countries have adopted the UN protocol against the smuggling of migrants, in addition to anti-trafficking laws. These anti-trafficking laws are useful in the region, which is rife with trafficking in persons especially women and children. Although trafficking in the region is mostly linked with economic survival and some cultural practices carried out by ordinary individuals and not necessarily transnational criminal networks (Sanchez, 2020). However, the arbitrary interpretation of immigration agencies in implementing laws on the smuggling of migrants have led to restrictive practices with negative effects on the movement of persons within the country and the region. In Nigeria, national courts have begun to adopt a restrictive interpretation of immigration laws in restrictive ways.

For example, a federal high court in Katsina, recently charged twelve persons for attempting to irregularly migrate to Europe through Niger (Radio Nigeria, 2020). This is particularly noteworthy as there is no provision in Nigerian law which criminalises attempts to migrate irregularly, either in the Immigration Act or in the Nigerian Criminal or Penal Codes. The migrants were therefore charged with evading immigration clearance while crossing Nigerian borders, based on section 46(3)(b) of the 2015 Immigration Act which states that *“if a person... refuses or fails to produce or furnish to any such officer or person any document or information which he is required to produce or furnish to that officer or person under this Act, or otherwise obstructs any such officer or person in the exercise of his functions thereunder; he shall be guilty of an offence.”*

Furthermore, an increasingly worrying practice of immigration authorities within the region who have been arresting circular or seasonal migrants for irregular entry and overstay in neighbouring countries, has also been observed in Nigeria. These increased arrests and deportations are in a bid to curtail irregular migration movements in the region. However, “irregular migration movements” are not defined and on the basis of the ECOWAS regulations are subject to varied interpretation by the Member States. More so, deportations are not carried out in accord-

ance with the conditions stipulated in the ECOWAS regulations of 1979 (see article 11), thus flaunting ECOWAS protocols and regional human rights commitments. Through the support of the EU and international organisations (including those implementing the UN GCM), restrictive definitions of irregular migration are adopted with the effect of curtailing or restricting regional human mobility.

23.2.2 Focus on returns and readmission: return into unemployment

Current migration cooperation between the EU and its Member States and the Nigerian government is focused on returns and readmission. There is still no readmission agreement between the EU and Nigeria, however Nigeria has several agreements with some EU Member States which are not regularly respected. For the Nigerian authorities, the focus is on exhausting all available local remedies in the host country before return is conducted, while EU countries on the other hand have the preference of conducting returns immediately when a migrant in an irregular condition is identified. Thus, the challenge for both authorities has been to find a compromise between these two positions.

Nigerian nationals are granted asylum in the EU on grounds of complementary/ subsidiary protection or non-expulsion due to humanitarian reasons. In 2019, 4365 out of 29660 applications were granted asylum in the EU in first instance and some after appeal (EUROSTAT, 2020). While some EU Member States authorities may erroneously assume that Nigerian nationals are not entitled to international protection, the violence in the country may necessitate protection under other statuses (UNHCR, 2020). This highlights the need for states to ensure that migrants and asylum seekers especially from large migrant origin countries do not fall within cracks of the migrant categories, especially where these do not reflect specific rights, needs or migration realities. More broadly, the case of Nigeria highlights the need to better explore and develop the linkages and protection gaps emerging from a strict application of the division between the GCM and the GCR.

However, while the return of migrants from EU countries is categorised by political gimmicks and uncooperative national authorities, return migration from African countries occurs more frequently and with less hassle (Ahrin-Sam and Zanker, 2019). This may be because of the negative and horrific human conditions in which migrants and

asylum seekers in neighbouring countries (such as Libya) find themselves. Consequently, while the number of yearly returns from EU countries to Nigeria has fluctuated between 100 – 500 returns, returns from Libya and neighbouring African countries to Nigeria are in the range of thousands (IOM, 2020; Zandonini, 2020). These returns are organised with the support of international organisations such as the IOM funded by the EU or its Member States.

One thing that the governments of both Nigeria and EU countries have failed to consider is the situation in which the returned migrants find themselves in Nigeria (Vermeulen, 2020). In some communities, the rate of re-emigration is higher because the conditions which migrants return to are much worse than the conditions which motivated them to migrate initially.

For some of these migrants, they may have taken loans to fund their migration (Sanderson, 2019), and on their return (without sufficient income and without having been able to earn income at their intended destination), have to begin repaying these loans. However, the employment and business conditions in the country are not such that would enable them to repay these loans swiftly in order to avoid negative consequences. Other migrants, on their return, are given support to start small businesses through micro-credit loans and facilities received from international organisations. However, these organisations fail to acknowledge the difficult business environment and the harsh conditions which limit the success rate and survival of small businesses. Consequently, these businesses do not thrive because of the challenging environment and the high costs of doing business (e.g. lack of power supply, multiple taxation by government agencies, high costs of inputs, high costs of rents etc.). Therefore, many returned migrants find themselves in a worse situation than the one they had prior to emigration (Zandonini, 2020).

23.2.3 Bilateral cooperation on development with a renewed focus on migration

Through bilateral cooperation on development, EU states have intensified their support towards curbing irregular migration from Nigeria to Europe. Although there are several studies that highlight the inconclusive effects of using development aid to address migration-related issues, the practice still continues, with such interventions framed

within the narrative of addressing the ‘root causes of migration’, which focus on the drivers that motivate people towards migration (Siegel 2019; Dennison et al., 2019). However, this narrative on root causes fails to acknowledge the role of current migration policies and other overarching economic policies (like trade and agriculture) and structural global inequalities in contributing to the current situation. Youth employment and economic empowerment programmes, linked to the so called ‘root causes’, are implemented in ‘migration prone’ communities in order to discourage young people from migrating to the EU. The outcomes of these programmes remain opaque.

The problematic relationship between development aid and migration is further demonstrated by the use of conditionalities to elicit the cooperation of migrant sending countries in their bilateral relations with the EU (Statewatch, 2020; ECRE, 2020). Several projects funded under the EU trust fund in Africa provide examples of the use of development cooperation instruments to achieve migration control (Oxfam, 2017). In Nigeria, development cooperation to fund migration control can be observed in the training and equipping of Nigerian immigration authorities with the objective of enforcing migration control on behalf of EU countries (TV 360, 2021; Punch Nigeria, 2019). More recently European states have focused on empowering authorities in Nigeria to play a more direct role in restricting migration.

23.2.4 Securitisation and militarisation of migration

Through increased cooperation with FRONTEX, West African states have carried out border controls, instituted border management systems and regular travel checks within the region (DW, 2019). These interventions are aimed at saving migrants from trafficking networks, being exposed to harm at sea or in the desert, thus motivated by humanitarian and anti-criminal motives. However, this cooperation also has the effect of increasing border checks in the region and in practice, imposing difficulties on the free movement of persons within the region by criminalising migration. This goes against the ECOWAS protocol on free movement (Zanker et al., 2020).

In Nigeria, migration discussions have become synonymous with terrorism, banditry and smuggling. Consequently, the use of military force to address these challenges and by extension restrict the movement

of persons even within the region is justified by the government. These military interventions motivated by the focus on counter-terrorism and anti-smuggling are aimed at reducing transnational organised crime in the region. However, these practices risk exacerbating other factors of insecurity and political instability, such as protests and social disorder by disgruntled youth seeking means to migrate. These interventions are now strongly linked to addressing irregular migration in the region, including controlling irregular migration and promoting border management.

23.2.5 Conflict between state and federal governments over the mandate relating to migration

In Nigeria, federal government ministries and agencies are in competition with state level ministries and agencies over access to funding for activities to curb migration and their mandate on addressing issues of migration (Olakpe, 2020). Consequently, in states such as Edo, where migration through irregular channels is rampant, there has been a taskforce on migration set up by the government (Houttuin and Haaij, 2018). Beyond economic reasons, migration is equally important in Edo because of the role of the diaspora in governance (the current governor of Edo has received huge support from the diaspora community) (Vanguard, 2020).

Moreover, measures at the state level are being taken to curb irregular migration and support the reintegration of returning migrants into their communities. To ensure the implementation of these measures at the community level, state governments demand direct support from their counterpart development and international organisations. This conflict is also an outcome of EU external migration management policies as it instigates a competition for resources between actors in the Nigerian federal system.

23.3 No end in sight? EU's continued fixation on the external dimension of migration

Presently, West African countries like Nigeria still find themselves confronted by the contradictory demands of two free areas of movement: ECOWAS and the EU. The new EU pact on Migration and Asylum aims to be a continuation of the efforts to externalise EU migration policies

in countries such as Nigeria. The crisis is now the new normal as argued by Landau and Freemantle (2020; see Chapter 24). One of the reasons for adopting this pact stems from and the need to adopt a more 'human and humane approach' to migration as emphasised by President von der Leyen in her State of the Union address (EC, 2020).

However, the recommendations provided by the New Pact in actual practice does not consider the human rights of migrants, which involves trading of migrants between countries and encampment in detention sites before deportation and summary deportation on arrival in the EU. Practices such as these contradict several commitments to which Nigeria and EU countries are signatory at the international level and further may undermine the implementation of the GCM and GCR related objectives. More worrying is the fact that international organisations which support Nigeria in the implementation of its migration commitments are also used to promote the implementation of the EU's externalisation agenda in the country.

Movement of persons – including Nigerian migrants in various countries on the African continent is important for socio-economic development. However, the current externalisation practices of the EU in several African countries does not bode well for the implementation of regional free movement measures and neither for the much wider continental free movement protocol which has been adopted by 33 African countries and is being pushed by the AU. By extension, this focus on restrictive migration policies and closing the opportunities for available migration channels, contradicts the UN GCMs objective to facilitate safe, orderly and regular migration. For countries like Nigeria, it is important to emphasise the human rights of migrants are respected and that the conditions to which migrants are returned are more stable and make them less vulnerable to exploitation. However, this equally requires introspection on the part of the Nigerian government as well as the EU.

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24. Containment Development and Africa's Time-Space Trap

Loren B Landau and Iriann Freemantle

24.1 Introduction

In 2015, a moral panic engulfed Europe. Long uneasy with African migration across the Mediterranean, the European Union (EU) and its Member States responded with unprecedented levels of peacetime defensive action. In the subsequent years, panic engendered a sophisticated, multilateral apparatus to suppress African mobility. The New Pact on Migration and Asylum represents the next stage in its evolution (European Commission, 2020).

24.2 From crisis to containment

The Pact demonstrates that what began as a crisis has now become a new 'normal'. It furthers efforts to institutionalise strategies that code 'ungoverned' and 'irresponsible' migration as existential threats to the EU, to host countries, and to migrants themselves. It outlines a series of initiatives – coercive, narrative and 'developmental' – to contain Africans' ambitions to move.

Importantly, the paternalism used to frame these efforts discursively reconciles intercepting and pre-empting Africans' movement with the EU's liberal, universalist foundations. The EU's *raison d'être* stems from respect for rights and dignity; concerns with safety and freedom; and dedication to progress for all (European Union, n.d.). It wants a future where Africans are ready to join the world. Within this rubric lies the rub: only the deserving and developed will be allowed to move; however,

demonstrating deservingness requires adherence to ever more restrictive if amorphous moral codes connected to legality, safety and responsibility. In effect, qualifying to move means surrendering the desire to do so. To gain entry, refugees and asylum seekers must demonstrate that they migrated almost exclusively by compulsion. (Ruy and Yayboke, 2020).

The justification for this approach and the EU's extra-territorial modalities are outlined in the Pact's opening pages (European Commission, 2020: 2):

Addressing the root causes of irregular migration, combatting migrant smuggling, helping refugees residing in third countries and supporting well-managed legal migration are valuable objectives for both the EU and our partners to pursue through comprehensive, balanced and tailor-made partnerships.

In this short statement, the European Commission is proposing that the EU dedicate itself, *inter alia*, to slowing migration by addressing the reasons people move. It also designates that to move legitimately means doing so in ways that states authorise and make legal. Ensuring that the only movements are righteous ones justifies extraordinary measures to regulate not just people's ability to migrate, but even their desire to do so.

24.3 Containment development and the 'time-space trap'

This Chapter argues that the apparatus furthered by the Pact entrenches two interrelated regimes of knowledge and control: Containment Development (Landau, 2019) and the Time-Space Trap (Freemantle and Landau, 2020). These institutional and discursive constructions not only recalibrate the EU's relations to Africa and Africans, but also to its own history and ethical commitments. It does this by casting migration management in humanitarian terms: to counter material and moral deprivations in ways that ready Africans for a universal liberal project. Working with allies across sectors and continents, this produces a regulatory regime that intercepts and prevents mobility while coding even the most coercive means as necessary to 'protect' Africans and foster their continent's development. Stepping back, we can consider the elements that set this trap.

It begins by reframing undocumented African mobility as both

illegal and immoral. It is worth noting the Pact's language: this is not a campaign to extinguish human trafficking and exploitation. It rather aims to suppress human smuggling. Given the tightening of borders into the EU and across Africa – in law if not in practice – almost anyone moving or planning to move will somehow intersect with agents, operators or actors otherwise complicit in human smuggling (Brachet, 2018). By default, almost anyone poor who has not pre-authorised a trip to the EU but begins a journey that may end there, becomes complicit in a crime. As the *Pact* notes (European Commission, 2020: 15):

This criminal activity therefore damages both the humanitarian and the migration management objectives of the EU. The new 2021-2025 EU Action Plan against migrant smuggling will focus on combatting criminal networks, and in line with the EU's Security Union Strategy, it will boost cooperation and support the work of law enforcement to tackle migrant smuggling, often also linked to trafficking in human beings.

Borrowing from dystopian science fiction (Niles, 2010), the EU goes beyond just punishing those who move, but has launched a form of 'chronoscopy' or 'pre-crime': to identify and correct those likely to transgress. Part of the correction comes through 'Containment Development.' This works by discursively removing the imperative to migrate. Although almost all empirical models suggest 'development' (i.e. economic growth) spurs movement (— including analysis by the European Commission (See Landau and Kihato, 2019; Natale et al., 2018) – the EU clings to the position that 'Economic opportunity, particularly for young people, is often the best way to reduce the pressure for irregular migration' (European Commission, 2020: 18).

In this, the EU shifts the goal of development from expanding human agency and opportunity, to immobilisation. In its own words, "The EU is the world's largest provider of development assistance [and] this will continue to be a key feature in EU engagement with countries, including on migration issues. Assistance will be targeted as needed to those countries with a significant migration dimension" (European Commission, 2020: 19-20). The European Commission is quite clearly proposing an institutionalisation of containment development.

Sprouting from the foundation myth that aid-spawned development prevents mobility, Africa becomes a space of potential and patriotism, not

desperation. Development also means fewer conflicts and declining displacements. One no longer needs to move to realise a desirable future or safety. Indeed, movement not only endangers yourself but threatens the prospects of your family, community and country. With the exception of a narrowly defined subset of refugees and asylum seekers, the Pact further entrenches the idea that Africans should dedicate themselves to achieving prosperity, *in situ* (Curzi, 2016). Only once people have realised appropriate, but amorphously defined, levels of wealth, education and respect for law – standards established by people outside African—are they ready to enter a global, mobile future. It is with this goal in mind that the European Commission will “...launch Talent Partnerships in the form of an enhanced commitment to support legal migration and mobility with key partners” (European Commission, 2020: 23). For the skilled and morally vetted, the EU and the world awaits.

For this to work, the EU explicitly recognises the value of creating visible but limited legal pathways. The Pact highlights that ‘Safe channels to offer protection to those in need remove the incentive to embark on dangerous journeys to reach Europe, as well as demonstrating solidarity with third countries hosting refugees. Legal migration can bring benefit to our society and the economy’ (European Commission, 2020: 22). In practice, these are effectively countermeasures intended to legitimise exclusion rather than open doors. As noted, throughout the Pact and other EU documents, sedentarism should be the default; mobility the exception. Yet pathways are a necessary part of the promise available to those who meet the right, restrictive criteria. Those who behave properly can take this road. But most cannot. Those moving via other means become marked, stigmatised. As the Pact notes, “developing legal pathways should contribute to the reduction of irregular migration” (European Commission, 2020: 23). In reality, it will exacerbate it by rendering almost all moves irregular.

24.4 Monitoring as moral policing

The EU aims to predict, quantify and publicise each African move. Each time someone moves (or even contemplates doing so) without authorisation it reinforces the appearance of Africans’ morally compromised lawlessness and justifies further intervention. To do this, the EU is working with partners to strengthen its surveillance of Africans

(Fallon 2020), their behaviour and their moral adherence. New research centres are part of this strategy as are high tech solutions and information systems (CORDIS, n.d. a). One of these, ROBORDER (Roboborder, n.d.), is an almost nine-million-euro effort to develop “a fully functional autonomous border surveillance system with unmanned mobile robots including aerial, water surface, underwater and ground vehicles, capable of functioning both as standalone and in swarms, which will incorporate multimodal sensors as part of an interoperable network.” This and similar efforts are essential to its chronoscopic project. As the Pact notes, “A seamless migration and asylum process needs proper management of the necessary information...An upgraded Eurodac would help to track unauthorised movements, tackle irregular migration and improve return.” Elsewhere (European Commission, 2020: 12-13) the Pact argues that “Interoperability will connect all European systems for borders, migration, security and justice, and will ensure that all these systems ‘talk’ to each other, that no check gets missed because of disconnected information, and that national authorities have the complete, reliable and accurate information needed.”

The Pact's current proposals complement significant investments in census offices, NGOs and university research centres (Barana and Toaldo, 2016), which will generate information on African migration like never before. But this is knowledge with a purpose – to regulate, to promote sedentarising interventions and to naturalise the desire to stay fixed in place and out of global time. Indeed, to naturalise these efforts, the EU is sponsoring dozens of programs aimed at localising Africans' future imagination: through education and advocacy African youth are instructed that migration is a betrayal of nation and family (IOM, 2019).

The MIRROR project (Migration-Related Risks caused by misconceptions of Opportunities and Requirements) aims to identify and ‘correct’ African views about Europe's potential (CORDIS, n.d. b). These campaigns are set to continue as “Tools such as strategic communication will be further deployed, providing information on legal migration opportunities and explaining the risks of irregular migration, as well as countering disinformation” (European Commission, 2020: 20). For those who still wish to move, an assemblage of surveillance and violence will keep them in place.

24.5 The illusory lure of futures elsewhere

In disingenuously dangling a global and mobile future to Africans willing to mould themselves into externally defined parameters of moral respectability, the EU asserts a form of temporal, pastoral power over would-be African migrants. Adherence to immigration regulations authored and often imposed by the EU, together with a demonstrated commitment to family, community and country mark one's suitability to enter a global future (see Adam and Trauner, 2016). But meeting these legal and moral standards effectively means building a life dedicated to 'development at home'. It is founded on a fundamental irony: only Africans willing to suppress mobility desires and adhere to EU-authored legal and social moralities can access the fruits of the EU's prosperity. Conflict and displacement are but further evidence of Africa's (and Africans') propensity to violence – a moral failing that can only be rectified through particular, place-bound political and social institutions.

It is important to note that contrary to analyses positing restrictive migration policies as betraying the liberal universalism on which EU polities and futures are founded, the Pact positions 'migration management' as an integral part of its reproduction. Warding off its own 'isolation and divisions' and ensuring its own 'freedom, protection and progress' (Macron, 2019), it effectively imposes on Africa the former and denies it the latter. It justifies raising borders and externalising its project of socialisation and subjectification so that in the future it may eventually allow 'in' the threatening, African 'other'.

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25. The New Pact on Migration and Asylum and African-European Migration Diplomacy

Andrew Geddes and Mehari Taddele Maru

25.1 Introduction

While labelled as a *New Pact on Migration and Asylum*, there is much within the European Commission's proposals as they relate to the 'external' dimension of migration and asylum policy that continues to be consistent with a direction of travel established during the 1990s when the EU looked towards closer cooperation with non-member states. This external dimension has become particularly relevant in relation to migration from African countries and an explicit recognition that the attainment of EU objectives requires working closely with African governments and African regional organisations.

In this contribution we draw from a recent working paper that we co-authored for the Migration Policy Centre at the European University Institute to consider the implications of the Pact for 'migration diplomacy' as it relates to migration relations between African and European governments and regional organisations (Geddes and Maru, 2020). We also change the focus from the EU perspective and consider the views of African governments and regional organisations in the context of 'migration diplomacy' and the associated transnational dynamics.

These considerations are urgent not only in the context of the Pact but also in relation to ongoing challenges (displacement from Ethiopia being the most recent) and also the underlying assumptions that inform EU thinking more generally on migration. There is a long-standing tendency

for the EU and its members to view Africa as a potential source of large-scale migration to the EU where relative inequalities of income and wealth, the effects of conflict between and within states and demographic changes are compounded by the consequences of the climate crisis and are then seen as sources of migration pressures on the EU (de Haas, 2007). This baseline assumption is important because it has played a substantial role in driving EU actions to tighten external border controls and to develop agreements with non-EU countries with the purpose of reducing flows towards the EU or dealing with 'root causes' (Geddes, 2021).

In 2017, in its White Paper on the Future of Europe (WPFE) the European Commission outlined visions of the EU's future development (CEC, 2017). As the WPFE puts it, 'the pressures driving migration will also multiply and flows will come from different parts of the world as the effects of population growth, widespread tensions and climate change also take hold' (ibid.: 11). Strikingly, while migration for work, family reasons and study remain key drivers for flows to the EU, the reference in the Commission's WPFE is to forms of migration shaped by crises – poverty, war, and climate change.

This kind of thinking provides an important backdrop for the development of diplomatic relations between the EU and African countries that, from an EU perspective, is driven by perceptions of crises of varying kinds and then designed to stem flows from Africa to Europe. It is, of course, the case that migration from Africa is not a simple unidirectional move towards the EU, but there is concern among EU governments about the potential for large-scale flows. Whether accurate or not, such perceptions have powerful effects.

25.2 Migration diplomacy

Migration has become a subject for diplomatic activity and assumed a more prominent place in the foreign policy agendas of African and European states, particularly in the form of formalised, multilateral platforms for migration diplomacy that bring together a wide range of state and non-state actors. Adamson and Tsourapas (2018: 115-16) show how strategies of migration diplomacy are shaped by states' economic and security interests with the use of 'diplomatic tools, processes, and procedures to manage cross-border population mobility' and pursue these interests. Tools of migration diplomacy can include bilateral and

multilateral agreements and ‘arrangements’ not qualifying as legally binding instruments such as the Global Compact for Migration. A key focus of these diplomatic processes will be on capacity-building and on persuasion, which is why the ideas that underlie policies are important because they influence the ways in which capacity to attain the objectives of the agreement or arrangement is built.

We now focus very specifically on African-European migration diplomacy to consider the ways in which it is constituted as well as some of the gaps. Addressing these gaps can be a way to build more effective partnerships by enabling a wider range of voices to be heard and for non-EU perspectives on policy challenges to be more central to debate.

The adoption process of the GCM and GCR presented Africa with a unique opportunity not only to articulate and share common priorities, opportunities and challenges but also to affirm its collective resolve to play its part in building an effective global migration partnership. Coming together as 55 countries representing a broad spectrum of stakeholders, Africa’s contribution to the GCM enabled Africa’s priorities and demands to be conveyed to the international community in a well-defined and well-communicated manner.¹ More importantly, Africa used the consultation process to demand that the international community guarantee the protection of fundamental human rights of migrants, including those from Africa. Efficient and sustainable migration governance architecture is unthinkable without the active participation of national and local authorities and local communities in African countries. The multilateral consultations on the formulation of the Global Compacts helped Africa to focus on local, national and continental partnerships and transformative capabilities for fair and effective migration governance within Africa. Crucially, African countries, through the AU and RECs, viewed the GCM not as an end in itself but as a means for building a progressive migration governance partnership at global and continental

1 Africa’s concerns were communicated at the 2018 international conference that led to the GCM; to the UN Economic Commission for Africa (UNECA) acting jointly with the AUC; and to other UN agencies such as the International Organization on Migration (IOM) and the International Labour Organization (ILO), as well as to RECs.

levels including with the EU.²

That said, due to power asymmetries between African and European actors, 'participation', 'consultation' and 'dialogue' on their own are not enough because they can just mean meetings without substantive action on the ground. Participation alone rarely leads to outputs and impacts. Attention must be paid to a shared strategic vision and to the development and implementation of strategic migration governance at local level. Thus far, African-European migration diplomacy has not led to strategic migration governance in Africa. Current African approaches to migration tend to lack a clear and comprehensive policy direction that reflects the national priorities and interests of those same African countries. Instead, there is a focus on the criminal justice system, with the emphasis on irregular migration, refugees and the prosecution of traffickers and smugglers through legislation. A more strategic approach can help shift away from migration management to migration governance with the potential to address the securitization of borders, the criminal approach to most migration-related public work and an undue focus on the negative aspects of migration.

25.3 Strategy first

Strategic migration governance requires not only the development of strategy but also identification of where responsibility for implementation lies. States will retain primary responsibility for stability and the provision of decent living standards meaning that responsibility lies primarily with national governments supported or enabled by sub-regional and regional organisations working with a range of other actors including international organisations and civil society. States bear responsibility for protecting their citizens and are expected to institute normative, institutional, collaborative and financial frameworks for migration governance. Hence, assisted by the international community, it is axiomatic that African countries should be held responsible for providing stability and essential economic delivery for decent living standards.

This also requires that strategic migration governance has a per-

2 UNECA, Global compact consultative meeting agrees Africa needs to drive and own migration narrative, October 31, 2017, available from www.uneca.org/stories/global-compact-consultative-meeting-agrees-africa-needs-drive-and-own-migration-narrative (accessed 2 November 2017).

spective that looks to the medium and longer terms. Clearly, the challenges related to migration are unlikely to be resolved – and may actually be worsened – by short-term containment strategies at the borders of countries of origin, transit and destination. African-European migration diplomacy should go beyond a response to irregular migration and displacement. Instead, it is necessarily linked to the African development agenda at national, local and international levels. The consequent social stability would make it possible to address the causes, triggers and accelerators of irregular migration and displacement. These require foresight and long-term strategic engagement. Unless governments get the fundamentals of migration governance right, current engagement with the EU will remain on weak foundations, and always brittle. A key problem is that African governments have yet to come up with a necessary degree of political determination and leadership for effective implementation mechanisms at national and regional levels. There is an urgent need for a nationally-owned, politically-led migration governance agenda. Effective migration governance cannot be achieved without acquiring and building the necessary capabilities to implement.

An argument can be made that priority in developing African-European partnerships on migration should have been – but was not – placed on building migration governance structures throughout Africa to develop comprehensive, stand-alone policies, as well as provide strategic thinking and clarity about the benefits and costs of migration. To do this requires a normative, institutional and collaborative state framework – in cooperation with non-state actors – that could facilitate voluntary, safe, orderly and legal mobility and a consequent reduction in forced or irregular migration.

25.4 Articulation of national migration policies

A first step to building such an institutional architecture could be national consultative conferences to articulate the policy direction of the countries at the national level dealing with existing normative frameworks on migration at the level of the African Union and Africa's regional economic communities. Given the transnational nature of migration, effective migration governance requires well-coordinated, coherent and harmonised national and regional collaboration. Such collaboration should extend beyond organisations and Member States to the development of bilateral, regional and global cooperation.

25.5 Diplomats in migration governance

Diplomacy is also necessary to ensure the protection of migrants' and refugees' rights and coordination among those involved, including the migrants themselves and the governments in their countries of origin, transit and destination. Regional frameworks and processes foster harmonised policies and shared minimum standards for consistency, cooperation and complementarity among Member States. Diplomacy can also facilitate harmonised policies at regional and national levels, help in the fight against criminal networks involved in human trafficking and smuggling and protection of refugees and the human rights of migrants. All this is likely to require greater numbers of migration diplomats including labour attachés – specifically more diplomats trained in migration governance.

Diplomats are also needed in the negotiation and implementation of agreements aimed at the facilitation of regional free movement and labour migration, which are unthinkable without regional policy harmonization. This is supported under both the GCM³ and GCR. This, at the regional level, could also foster complementary initiatives such as training, education and job market matching with an impact on migration within and outside Africa. In the Horn of Africa, for example, the Intergovernmental Authority on Development (IGAD) has initiated regional- and national-level processes, all of which require dynamic migration diplomacy programmes staffed by diplomats and officers who understand migration governance.

25.6 Progressive norms, regressive implementation

The AU and EU have long stated their commitment to a normative framework, but while progress in norm-setting has been relatively rapid, implementation has been slow. Practical steps are required to provide

3 See labour mobility under GCM objectives 5 (Enhance availability and flexibility of pathways for regular migration), 6 (Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work) and 18 (Invest in skills development and facilitate mutual recognition of skills, qualifications and competences) and GCR on labour mobility paragraph 42 (A multi-stakeholder and partnership approach), paragraph 95 (Complementary pathways for admission to third countries).

resources for implementation. African states generally still lack the will (as manifested by low levels of budgetary allocation), determination, institutional framework and resources necessary to govern migration effectively. Putting into effect those policies advanced in AU-EU policy documents demands coherent, consistent and comprehensive planning, and resourcing of implementation. Governance and institutional inadequacies are attributable primarily to the meagre resources allocated to migration governance in national budgets, and challenges will remain for the foreseeable future unless partners devote larger resources to plug gaps in funding, address institutional weaknesses and help implement the recommendations advanced in AU-EU policy documents.

25.7 Implementation is local

‘Localization’ and local ownership are likely to be crucial implementation mechanisms, a fact recognised in both the GCM and GCR. Migration diplomacy can be a valuable tool for effective local governance of migration in border areas. Building an efficient and sustainable migration governance architecture is unimaginable without the active engagement and devolution of powers, including financial, to national and local authorities and engagement with local communities. Community engagement means considering the particularities of localities and communities, their emerging issues and the priorities of migration source hotspots and border areas. To avoid the common mistake of ‘one size fits all’ or EU-centric ‘our size fits all’ programmes, migration policy requires decentralised planning and implementation to enable migration governance to recognise the necessity of embracing proximity, local expertise and legitimacy and to tailor interventions to local contexts. Localization can encourage local entities to initiate their migration management proposals and potentially help to reduce the negative impacts of securitized migration management and excessive border controls that have substantially undermined the other useful components of cross-border trade, including significant opportunities for peace, mobility, integration and regional prosperity.

A productive path for future AU-EU migration diplomacy would be a focus on localising the migration agenda and devolving migration governance with greater involvement of local populations, allocation of resources and decision-making powers by local authorities as provided

under GCM and GCR⁴ – co-opting them as vital participants in finding solutions to the challenges of migration governance. This includes cross-border areas. Clearly, decentralisation demands the capacity to implement and discharge the responsibility that can be developed in the context of enabling the state and local authorities to take responsibility for the governance of migration in the regions and localities they administer.

The EU and other international actors should not be encouraging – or funding – national systems that coercively replace local priorities and disempower local authorities. Migration diplomacy should have as its objective the aim of endowing local authorities with the capacity to govern migration effectively in their areas. Many African countries need a strategy-led migration governance, replacing the current legislation-led migration management. They also need clarity in strategic vision and building the requisite capabilities for implementation at local, national and regional levels. A corollary of this is the urgency of a shift of mission for the EU's migration partnership with Africa which is not clearly spelt out in the new pact.

4 See GCM's Whole of Society approach and Objective 17 (Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration); Objective 15 (Provide access to basic services for migrants); Objective 16 (Empower migrants and societies to realize full inclusion and social cohesion); Objective 8 (Save lives and establish coordinated international efforts on missing migrants); and paragraphs 40–54 on implementation and follow-up, and GCR under paragraphs 3, 37, 62, 67 and 97 all of which require the full engagement of local authorities and communities.

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26. When Principles Are Compromised: EU Return Sponsorship in Light of the Un Global Compacts

Lina Vosyliūtė

26.1 Background

Some ‘rebelling’ EU Member States have been challenging the principle of equal solidarity and fair responsibility-sharing over asylum seekers and refugees for the last five years (Frasca and Gatta, 2020). In response, the new European Commission came up with a compromised solution in the new Pact on Migration and Asylum (Carrera, 2020), attempting to get the same rebels on board by blending a political priority to increase the EU’s return rate (a policy dubbed ‘return at any costs’ (Eisele et al., 2020)), with the so-called ‘new forms of solidarity’ (European Commission, 2020a).

Return sponsorship is the new option on the menu. The proposed directive on asylum and migration management (European Commission, 2020a, Article 55, para. 1) outlines: “a Member State may commit to support a [benefiting] Member State to return illegally staying third-country nationals by means of return sponsorship”. In essence, the ‘new approach’ allows those who are unwilling to show heartfelt solidarity in relocating asylum seekers from frontier EU Member States (labelled as ‘benefiting Member States’), to offer ‘half-hearted’ solidarity. It seems that a committed marriage of solidarity (in sickness and in health, in poverty and in wealth...) within the Union under Article 80 of the TFEU, has been replaced with a ‘friends with benefits’ arrangement, referred to as the oxymoronic phrase ‘mandatory flexible solidarity’.

The ‘sponsoring’ Member State (e.g. Hungary or Poland) would arrange returns of certain nationalities directly from and in close cooperation with the ‘benefiting’ or frontier EU Member States (e.g. Greece or Italy). The assumption is that the sponsoring Member State would use their bilateral agreements with third countries to push ‘voluntary’ returns or deportations. If both countries do not manage to return a person within eight months (under normal circumstances), such a person would be ‘relocated’ to continue the return procedure directly from the sponsoring country. This inevitably prompts the question: was it realistic for the European Commission and the EU Member States to count on governments such as the Visegrad group (the Czech Republic, Hungary, Poland and Slovakia) to sponsor returns of irregular migrants? More importantly, how can the EU guarantee vis-à-vis third countries that such returns will be implemented in line with EU and international law?

I argue that the ‘sponsored returns’ strategy is neither a solidarity-advancing nor an evidence-based strategy. It stands at odds with the EU’s commitment to its own Better regulation guidelines (European Commission, 2017). Furthermore, this ‘compromised solution’ does not build on lessons learned from carrying out the EU readmission agreements and arrangements with third countries (Carrera, 2016) or implementing the EU return directive (Eisele et al., 2020).

Firstly, governments that do not uphold internationally agreed and legally binding human rights standards cannot be seen as trustworthy partners among third countries – especially in the sensitive area of returns and readmissions (Carrera, 2016). The EU is compromising the standards and principles agreed upon with the rest of the world just two years ago within the scope of the United Nations Global Compact for Safe, Orderly and Regular Migration (GCM) (UN General Assembly, 2018a) and the Global Compact on Refugees (GCR) (UN General Assembly, 2018b).

Secondly, the Pact’s proposal for ‘sponsoring returns’ requires an even higher degree of trust among the EU Member States of the first arrival of asylum seekers and other migrants and countries ‘sponsoring returns’ – those same countries who have not agreed to cooperate with relocations in the first place. Many things could go wrong here without making explicit the EU’s internal and external cooperation principles as well as ongoing independent monitoring.

Finally, we must grapple with the reality that is the mishandling of

returns by ‘sponsoring countries’. The Commission’s (2018a) proposal to recast the EU Return Directive has introduced a ‘border procedure’, lowered procedural safeguards, and encouraged returns to be based on informal bilateral agreements in the absence of post-return monitoring (Vosyliūtė, 2019a). It also foresees that EU institutions and agencies will get even more involved in handling returns and readmissions.

The ‘return sponsorship’ increases the likelihood of fundamental rights violations while simultaneously diffusing accountability across the ‘benefiting’ Member State, ‘sponsoring’ Member State and the relevant EU agencies and institutions. If such breaches are enabled by the EU return policy via laws, policies, funding or operations, the glaring problematic is: who will be held accountable for the violations of fundamental rights?

26.2 New EU vocabulary: what ‘solidarity’ means in the EU

The Court of Justice of the European Union (CJEU) (2020a) in joined cases of *Commission v. Poland, Hungary and the Czech Republic* (C-715/17, C-718/17 and C-719/17) has confirmed that the principle of solidarity is a legally binding obligation under Article 80 of the TFEU. Nevertheless, instead of applying political pressure to implement this CJEU decision, the European Commission (2020b) decided to reformulate what ‘solidarity’ means in the EU political vocabulary by coining a new oxymoron, namely ‘mandatory flexible solidarity’ in their New Pact on Migration and Asylum, launched on 23 September 2020. The new approach to solidarity has been detailed in proposal for directive on asylum and migration management (European Commission, 2020a) and the Commission Staff Working Document accompanying it (European Commission, 2020c).

The EU Member States were given a new menu with several options. They could choose between ‘sweet and salty’ – whether to show solidarity in relocating asylum seekers and/or in sponsoring return. The Commission expected that the Visegrad group would take the latter bait. In some instances, the Commission (2020c) also allowed for a ‘dessert’ – to make other contributions, for example in capacity building, operational support or an external dimension.

The European Commission (2020c) has foreseen that once the

flexible aspect fails, ‘compulsory solidarity’ via a ‘corrective mechanism’ would kick in, after a long back-and-forth procedure. Nevertheless, the Commission left implementation of ‘sponsored returns’ for a Member State-run show with ‘built-in flexibility’. For instance, “Member States would have to submit Solidarity Response Plans indicating which solidarity contributions they will make.” The Commission (2020c) would simply cross-check these submissions against the distribution key based on 50% GDP and 50% population.

The Commission (2020a) has proposed a time-frame for sponsoring Member States to carry out a return: “a period of 8 months (4 months in situation of crisis)”. If this period has expired, the person concerned would need to be relocated to a sponsoring country to continue return procedures from that territory. The frontier EU Member States, namely Greece, Italy, Malta and Spain called to reduce this time-frame to 6 months or even 3 months (Nielsen, 2020a). Those, labelled as ‘benefiting ones’ were not convinced. The frontier Member States, dubbed the Mediterranean axis EUROEFÉ-Madrid (2020), voiced their concerns over the lack of ‘mandatory solidarity’ and called for greater clarity (Nielsen, 2020b) in assigning responsibilities on ‘return sponsorships’. One of their concerns related to their liability for (in)actions of the sponsoring country. The proposed directive on asylum and migration management (European Commission, 2020a, Article 55: para. 4) foresees that “These [return sponsorship] measures shall not affect the obligations and responsibilities of the benefitting Member State laid down in [EU return] Directive 2008/115/EC.”

On the surface, this seemed to at least benefit some ‘rebellious’ EU Member States playing ‘bad cop’ – quickly brokering bilateral deals and deporting irregular migrants on behalf of another EU Member State without fear of public shaming or repercussions from human rights bodies. Such sponsoring Member States would be seen as improving EU return rates, while maintaining anti-migrant sentiments in front of their voters.

Instead, the day after the Commission launched the New Pact on Migration and Asylum, the Hungarian and Polish prime ministers rushed to Brussels to denounce any mandatory aspect of ‘solidarity’ in the EU return policy on behalf of the Visegrad bloc (Brzozowski, 2020). They knew too well that the task ahead would not be an easy one. Such

‘sponsors’ would need to broker returns with ‘countries of origin’ and ‘safe third countries’ with which they may not have good relations (Carrera, 2016; Cortinovis, 2018; Vosyliūtė, 2019). However, leaving aside a Eurocentric approach, it may be useful to explore on which bases partners around the globe could trust them.

26.3 The basis of trust for international cooperation in the area of returns and readmissions

The international trust-based cooperation in migration and asylum would require a different set of principles be followed than the flexible approaches proposed in the Commission’s New Pact. For instance, in the area of migration, all cooperating states are seen as equal partners. They treat migrants – citizens of another state – with equal dignity and respect. In the area of asylum, the UN Geneva Convention foresees that refugees are entitled to international protection and *non-refoulement* by the receiving state because the refugee’s country of origin cannot be trusted. These principles were recently reiterated and re-confirmed in the New York Declaration of 2016 (UN General Assembly, 2016). It led to the drafting of two UN Global Compacts in 2018 – one on refugees and the other on migration (UN General Assembly, 2018b and 2018a respectively).

Both Compacts upheld previously existing international and regional human rights standards on returns. The GCR proclaimed that states should aim at “durable solutions” (UN General Assembly, 2018b, para. 89). The GCR also called states “to expand access to third-country solutions and to support conditions in the country of origin for return in safety and dignity”. The GCR promotes “enabling conditions for voluntary repatriations” as opposed to “forced returns” (UN General Assembly, 2018b, para. 87). Similarly, Objective 21 of the GCM (UN General Assembly, 2018a) emphasises the commitment to “facilitate safe and dignified returns” and “to guarantee due process, individual assessment and effective remedy” to protect from ‘*refoulement*’.

The few EU governments who abstained or voted against the Global Compact for Migration (GCM) demonstrated a political choice to depart from already internationally agreed standards (Carrera et al., 2018a). The GCM has not been signed or ratified by nine EU Member States:

the Czech Republic, Hungary and Poland (voted against the GCM); Austria, Bulgaria, Italy, Latvia and Romania (abstained) and Slovakia (did not attend this UN General Assembly meeting to adopt the GCM) (Vosyliūtė, 2019b).

Hungary is also not a party to the Global Compact on Refugees (GCR). While 181 countries voted in favour, Hungary and the United States were the only two nations that voted against the GCR. Thus, the Hungarian government demonstrated a clear stance of unilateralism and departed further from non-negotiable standards undermining its national constitution and the Common European Asylum System (CEAS). Such a departure of EU Member States is somewhat anecdotal since Ferris and Donato (2019) argue that the EU has initiated this process to find a global solution to the so-called 'European refugee crisis'.

The misunderstanding shared by the Hungarian government and others who haven't approved the GCM is that they are not obliged to comply with international and regional human rights standards. The GCM summarises existing commitments in international human rights and labour law without adding any new legal obligations. It does, however, propose an evidence-based and human-centred narrative around human mobility. The EU delegation in New York and the European Commission have confirmed that the GCM was reflecting EU's *acquis* (Vosyliūtė, 2019b). The Commission (2018b) even put forward a proposal for the EU Council to approve the GCM on behalf of the Union (it was later revoked due to lack of support).

Thus the controversy around the GCM is a clear indicator of how these Member States are also departing from EU treaty principles of the rule of law, fundamental rights and democratic accountability (Vosyliūtė, 2019b). The European Union is likely loathe to admit that such Member States are invariably pushing the Union's migration and asylum policies further away from the EU's founding values and those agreed in Global Compacts.

In spite of the concessional wording, the Visegrad countries initially have not agreed to 'mandatory flexible solidarity', perhaps because they know too well that returns and readmissions require international cooperation and not unilateralism. Indeed, Carrera (2016) finds that for the sensitive area of readmissions, trust and international reputation may be crucial for the much sought-after 'efficiency' of returns. , Carrera (2016)

argues that “identification procedures in light of the EU’s Readmission Agreements, present many challenges and require verifiable and rebuttable (not blind) trust-based international cooperation with third countries”.

The New EU Pact on Migration and Asylum encourages Member States to ‘pool’ their bilateral agreements and informal arrangements – as it regards who could return which third country nationals. The Commission had tested this approach when Member States were cherry-picking asylum seekers rescued at sea for their potential returns based on their nationalities (Carrera and Cortinovis, 2019). While this approach has worked on a small scale, the dynamics in bilateral agreements and arrangements are far more complex.

For instance, Cassarino and Marin (2020) argue that although there are “320 bilateral agreements linked to readmissions” concluded by EU27 and third countries, “bilateral cooperation on readmission [cannot] be viewed as an end in itself, for it has often been crafted onto a broader framework of interactions.” Bilateral agreements and arrangements have stakes on both ends. They are unlikely to become the Trojan horse to pursue the EU’s self-interested goal to deport all irregularly staying third-country nationals through the doors of the EU Member State who have the best relations with the given third country of origin. This would very likely upset such bilateral relations.

Besides, European countries often underestimate other competing priorities with the third countries. For instance, remittances in many developing countries continue to be a far more relevant income source than development aid (Konte and Mbaye, 2021). They also overestimate incentives from the EU’s visa policies (Cassarino, 2020). Consequently, EU-centred readmission agreements or informal deals may also be implemented half-heartedly by third countries.

Cassarino and Marin (2020) summarise it aptly: “readmission is inextricably based on unbalanced reciprocities”. Carrera (2016) provides evidence for how such a top-down approach backfires. For instance, in readmission procedures, mobility of certain nationals is treated as quasi-criminal activity. Thus, the country of origin may be less willing to cooperate in issuing documents as such treatment of its citizens undermines sovereignty and equal standing in the international arena.

The European Parliament report on return highlights that lack of

cooperation from third countries in identification and documentation procedures is “one of the main reasons for non-return” (Strik, 2020). Therefore, European Parliament (2020) called “to improve relations with third countries in a constructive migration dialogue based on equality” and to aim at “sustainable returns.” Parliament (2020) also criticised the use of informal bilateral deals, which escape democratic control, unlike formal EU readmission agreements (EURAs). The latter have better-defined responsibilities and require ex-ante and ongoing human rights impact assessments. However, this Commission’s (2020d) list of EURAs raises serious questions about EU principles, too. For instance, the latest EU Readmission agreement was concluded with Belarus in June 2020, in the midst of violent suppression of civic protests against the dictatorial regime (EU and Belarus, 2020).

26.4 What is the basis of trust among the EU Member States cooperating on returns?

The Commission’s (2018a) explanatory memorandum of the proposal to recast the Return Directive highlighted the importance of “common standards and procedures”. However, fundamental rights standards have been reframed as obstacles for ‘efficiency’ of return rates (Vosyliūtė, 2019a). While the Commission was satisfied with the explanatory memorandum, the European Parliament conducted a substitute impact assessment (Eisele et al., 2019) and an implementation assessment of the EU return directive (Eisele et al., 2020). The latest assessment (Eisele et al., 2020) concluded that the EU’s return policy is over-relying “on interstate trust and the procedural safeguards available to the person prior to removal or readmission”. These findings are in line with the academic evidence highlighting the importance of verifiable trust (see Carrera, 2016; Cassarino and Marin, 2020; Cassarino, 2020).

The Commission’s (2018a) proposal to recast the EU Return Directive attempted to lower procedural safeguards. For instance, the European Union Agency for Fundamental Rights (FRA) (2019) argued that no person shall be returned before the negative decision on asylum application becomes final. The FRA (2019) raised concerns over the speed and quality of such decisions, particularly in the context of border procedure. The border procedure (if approved) would introduce an alternative return regime with even lower procedural safeguards than

those proposed in the recast Return Directive (Vosyliūtė, 2019a).

The Commission (2018a) stressed increasing efficiency of returns as a primary reason behind the ‘targeted revisions’ in the proposed directive. The European Parliament’s implementation assessment of the current EU Return Directive (Eisele et al., 2020) cautioned that: “To prioritise the return rate as the primary indicator runs the risk of incentivising ‘return at all costs’, without taking stock of the full human, foreign relations and other costs”.

The new EU return policy has been an outcome of a blame-shifting game among the EU Member States, the European Commission and Frontex. For instance, the Commission (2018a) stressed that “the shortcomings of Member States’ return procedures and practices hamper the effectiveness of the EU return system.” The EU return policy has shifted towards more coercive approaches over durable solutions and migrants’ agency (Vosyliūtė, 2019a). The Commission’s ‘targeted revisions’ are likely to fall short of ‘efficiency’ in light of its better regulation guidelines, since ‘efficiency’ requires an assessment of individual and fundamental rights impacts (European Commission, 2017).

The EU return policy has been moving further away from the GCM (Vosyliūtė, 2019b). The EU draft law foresees the EU Member States’ obligation to detain those “at risk of absconding”. Such a political choice does not encourage investing in alternatives to detention. Detention risks becoming a default option in the EU, including for minors. As such, the Commission’s current proposal is incompatible with GCM (UN General Assembly 2018a) Objective 13 “using detention as a last resort”. Besides, GCM Objective 7 calls on States to ensure “basic rights”, including procedural rights, despite the status and “to facilitate access [...] to an individual assessment that may lead to regular status” to those migrants that cannot be removed. The Commission’s (2018a) proposal has not reflected these considerations. However, the European Parliament (2020) proposes an alternative view on return management in the EU. Strik (2020) in her report argues for including possibilities to regularise non-removable persons’ status, as it would resolve administrative limbo, would “reduce vulnerability to labour exploitation and may facilitate individuals’ social inclusion and contribution to society”.

26.5 When everyone gets involved in returns – who is responsible for breaches?

As foreseen with the New Migration and Asylum Pact, EU institutions and agencies will become more involved in handling returns, thus creating a chain of responsibility. As argued by Carrera and Stefan (2018) the more players are cooperating without clear mandates and responsibilities the harder it is to access justice and seek effective remedies. The explanatory memorandum of the proposed EU Return Directive (European Commission, 2018a) highlighted that challenges for ‘efficient returns’ arise from EU Member States’ non-flexible interpretation of the current Return Directive and for third countries that are not keen to readmit their nationals.

Meanwhile, the European Commission has equipped Frontex with more power in returns operations. Civil society and some academics have dubbed it ‘EU’s deportation machine’ (Jones et al., 2020). As the EU’s return agency, Frontex only has a mandate “to support and monitor” Member States, and decisions on merits (i.e. whether there are risks of *refoulement*) in return procedures remain the sole responsibility of a Member State. Frontex – as other EU agencies – should be accountable to both EU institutions, EU supervisory authorities and courts. However, the increasing role of Member States in the management board once again blurs the lines of accountability (Carrera and Stefan, 2018; Jones et al., 2020). While Frontex is required to monitor the treatment of migrants during deportations, there is no subsequent post-return monitoring to ensure that a returnee was re-integrated and did not experience any further violations of human rights (Jones et al., 2020). So: how would Frontex would go about following instruction that is ‘international and EU law’ non-compliant? Mishandling of returns by ‘sponsoring countries’ is already an inconvenient reality. The following case study illustrates the point of likely controversies.

In May 2019 Hungarian authorities attempted to return an Afghan family in contradiction with EU asylum acquis and international laws (Thrope, 2019). The watchdog civil society applied for interim procedures at the European Court of Human Rights and managed to suspend deportation of the family. United Nations High Commissioner for Refugees (UNHCR) (2019) raised public concerns for the grave viola-

tions of the Geneva Convention since Hungarian authorities have not considered their asylum claims, declaring them ‘inadmissible’. Media (Thrope, 2019; Palfi, 2019; Aljazeera, 2019) have vividly depicted this episode, reporting deprivation of food and other inhuman and degrading treatment, including intimidation with the return procedure to Afghanistan so as to force people to turn back to Serbia. Eleven of them did so.

In this case, the Hungarian authorities used the EU’s involvement to legitimise such returns. The Hungarian Immigration and Asylum Office (IAO) said to journalists that “the measures were part of a joint operation with European border and coastguard agency Frontex, in which 39 people were flown to Afghanistan altogether” (Aljazeera, 2019). Later, Frontex refused to deport some Afghani nationals due to pressure from civil society and human rights bodies, however human rights violations such as deprivation of food or overuse of violence have continued (Jones et al., 2020; Statewatch, 2020; ECRE, 2020).

In January 2021, Frontex announced “suspending operations in Hungary” (Nielsen, 2021a). According to the media, Frontex became concerned that despite the CJEU decision in December 2020, Hungarian authorities pushed out more than 4400 people without assessing their asylum claims (Nielsen, 2021a). The Frontex Consultative Forum, composed of civil society representatives, has been calling for years not to support Hungarian authorities in returns (Jones et al., 2020; Statewatch, 2020). The European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) mission report in 2020 reiterated that Frontex is under obligation to withdraw support in operations where fundamental rights are not respected. It led to the European Parliament launching an inquiry into the agency’s activities in January 2021 (Nielsen, 2021b). This episode illustrates that the EU agencies and even EU institutions carry the ‘chain of responsibility’ whenever human rights violations arise.

‘Return sponsorship’ places EU Member States – especially those that departed from ‘equal solidarity’ and human rights standards reiterated at the GCM – at the core of implementing the return decisions made by ‘the benefiting country’. Thus, such breaches are ‘enabled’ by EU return policy via laws, policies, funding or operations and it will invoke the Union’s responsibility via the portable justice approach (Carrera et al., 2018b). But who would be responsible to define who is accountable for fundamental rights violations if everyone gets involved? A chain of respon-

sibility model could be useful in capturing the direct or indirect roles of all actors involved in fundamental rights violations during and after returns. This could lead to more effective remedies for rights violations of returnees.

It seems that immense pressure is mounting on the international and regional human rights bodies, EU supervisory institutions and independent ‘watchdog’ actors – civil society and journalists (Vosyliūtė and Chun Luk, 2020). ‘Sponsored returns’ are likely to be brokered and implemented by some Member States where the EU rule of law, fundamental rights and democratic accountability principles are already compromised. Vosyliūtė and Chun Luk (2020) demonstrated that governments that fear accountability and liability are curtailing watchdog actors in the area of migration. Some EU Member States are policing and criminalising those who are trying to uphold EU and international legally binding principles (Carrera et al., 2019; Vosyliūtė and Conte, 2019; Allsopp et al., 2020). When principles agreed upon in both Global Compacts and among the EU Member States are compromised, the EU founding values become an empty shell rhetoric.

26.6 Three scenarios on how ‘sponsoring returns’ can backfire

The New EU pact on Migration and Asylum already blurs the lines of ‘who does what?’ (Carrera 2020). I argue that return sponsorship as a ‘new approach on solidarity’ further blurs accountability. The EU return policy by design creates a chain of responsibility. What follows are three hypothetical and equally concerning scenarios that illustrate this point. They are based on previous experiences with the EU mandatory relocation schemes (ECRE, 2018) and with the implementation of EU returns policy (Eisele et al., 2020), both attempts to externalise responsibility for asylum (Carrera et al., 2018b) seekers:

- first scenario: quick returns to third countries;
- second scenario: ‘sponsoring countries’ overtake pre-return detention; and
- third scenario – ‘sponsoring countries’ leave the burden of detention to the ‘benefiting countries’.

First scenario: quick returns to third countries

The New EU Pact on Migration and Asylum foresees that migrants who could not be deported within eight months in a normal situation and within four months in a situation of crisis would need to be brought into a sponsoring country and deported from there. So, a 'sponsoring country' e.g. Hungary would need to proceed speedily with returns, as otherwise they would risk ending up with irregular and non-removable migrants from the 'benefiting country', e.g. Greece.

The speed and lack of oversight of how the return decisions are made by the 'benefiting' country and implemented by the 'sponsoring' one, would risk violating procedural safeguards, including effective remedies and the '*non refoulement* principle'. Persons would be sent to third countries with the knowledge and involvement of EU agencies, regardless of whether they would be 'safe' for the person in question (i.e. LGBTQ+ to Pakistan, where it is a criminal offence) and whether individuals have any prospect of a dignified, humane and just existence. In some third countries, returnees face automatic detention, for instance in Libya; in others they have to pay penalties for 'unauthorised exit', as in Egypt, Morocco, Tunisia and others (Grange and Flynn, 2014).

The first scenario aims to externalise responsibility and delegate the containment practices to countries of transit and origin via various informal bilateral deals and multilateral arrangements that do not consider human rights impact (Carrera et al., 2018b). Simultaneously, the EU would lose any political leverage to criticise how such returnees are treated after their return, as has happened with similar third country arrangements, such as in Turkey, Afghanistan or Pakistan. In this scenario, returnees are left at high risk of human rights violation during and after the return procedure, so who would be responsible in courts?

Second scenario: 'sponsoring countries' do not manage to complete returns quickly and thus have to overtake pre-return detention

The second scenario foresees that if 'sponsoring countries' (working in close coordination with 'benefiting countries') are not successful in brokering voluntary returns or obtaining valid documents and sending people to third countries, they would overtake pre-return detention in their territory. Thus the 'concentration of arrivals' in benefiting countries such as Greece or other EU frontier countries would be replaced by 'concentration of returns' in sponsoring countries. As discussed above, the

‘return sponsorship’ was invented to bring on board Hungary or other countries in the Visegrad group that were unwilling to cooperate in relocations. Those same countries were also not willing to recommit to the international standards in the GCM. Some of them have poor migrants’ rights record (Council of Europe Special Representative on Migration and Refugees, 2017; UN Special Rapporteur on migrants, 2021), thus making the EU vulnerable to inviting another more dangerous situation.

Illegal pushbacks, collective expulsions, torture and other inhuman and degrading treatment practices have already been reported by the European and international human rights bodies (Council of Europe, 2017; Parliamentary Assembly of Council of Europe (PACE), 2019; Strik, 2019; The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2018; UN Special Rapporteur on human rights of migrants, 2021). They are likely to escalate further and give rise to the EU’s complicity in crimes against humanity. The UN Special Rapporteur on Torture (2018) Nils Melzer has openly warned that: “personal involvement in shaping, promoting and implementing policies and practices which expose migrants to torture or ill-treatment may amount to complicity or other participation in crimes against humanity or war crimes.”

The prolonged detentions of non-removable migrants in sponsoring countries would risk going in that direction. Thus, if a *M.S.S. v. Belgium and Greece* (European Court of Human Rights, 2011) judgment logic is applied by the courts, it could already preclude benefiting countries to relocate irregular migrants to certain sponsoring countries due to the likely fundamental rights violations. Again, how would benefiting and sponsoring country and EU agencies resolve their inter-related accountability?

Third scenario: ‘sponsoring’ countries leave the burden of detention to ‘benefiting’ countries

Let’s imagine that the ‘sponsoring return’ state does a lousy job of obtaining documents, finding voluntary return solutions or using its bilateral deals – and a person is detained for a prolonged period in the ‘benefiting country’. Eventually, the sponsoring country would find operational or even legal excuses (including on the grounds of EU law), as to why such individuals should not be relocated to ‘sponsoring’ countries for return (for example, the health risks in light of the pandemic, public policy or national security).

In the past, for instance, the Hungarian authorities have been very creative in placing obstacles for asylum seekers (coming from Serbia) – with measures such as accepting applications at only two border crossings to capping the number of applications at a few people per day. The CJEU (2020b, para.118), the EU's highest court in Luxembourg judgement in *Case C-808/18* concluded that Hungarian authorities created a “virtual impossibility of making their [asylum] application”. Such creativity would likely be revived.

The third scenario leads to lengthier detention and overcrowding detention facilities and increased risks for inhuman and degrading treatment in the countries of asylum seekers' first arrival. The ‘benefiting’ countries would be left alone to carry out illegal pushbacks, pull-backs, collective expulsions or returns incompatible with the non-refoulement principle (PACE, 2019; Strik, 2019). The EU institutions would have little say, since ‘equal solidarity’ and ‘fair responsibility-sharing’ are no longer the EU's principles.

In this scenario, the European Commission would be engaging in attempts to further lower fundamental rights safeguards to accommodate the situation. The benefiting countries would aim to limit democratic accountability and access to justice for the mistreatment of irregular migrants. This would lead to greater secrecy, informality and silencing of any watchdog civil society, independent journalists, supervisory authorities and even courts. In this case, again, clarity is sorely lacking as to who would be the accountable one – the benefiting country, the sponsoring one or the European Commission.

26.7 Conclusion

It was a risky bet for the European Commission to entrust countries that were unwilling to participate in global solutions, such as the GCR and GCM, to sponsor returns and readmissions of irregular migrants. Such a sensitive issue requires verifiable and rebuttable ‘international trust-based cooperation’ with third countries. Who is going to trust those who are putting themselves above internationally agreed standards and principles?

For the EU, the headache is not only its international reputation as a partner that ‘walks the talk’ but also the risk of legal liability. ‘Return

sponsorship' blurs who is accountable for what. On the one hand, the long '*chain of responsibility*' makes it increasingly difficult to assign the accountability for fundamental rights violations of detained or expelled individuals. On the other, it is hard to imagine the situation where all the relevant actors directly or indirectly involved ('benefiting' and 'sponsoring' EU Member States, EU institutions and agencies, namely Frontex) would be called out. This will only increase the blame-shifting game among them. To avoid such chaos, the EU needs to stand firmly – with actions and words — behind the meaning of solidarity.

The implementation of Global Compacts and independent monitoring of the EU treaties principles are ever more critical for establishing trust among Member States, EU institutions and agencies, third countries and – not least – migrants and refugees themselves.

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Publications Office
of the European Union

ISBN:978-92-9084-999-5
doi:10.2870/541854